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NO.

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON,
GEORGE M. DAVIES, ET AL.,

PETITIONERS,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C.,
and BANCO NACIONAL DE MEXICO, S.A.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED:

1. Are foreign banks permitted to advertise, promote, offer and sell their deposit instruments in the United States as attractive investments without complying with the registration and disclosure requirements of the Securities Act of 1933?

2. Do principles of international law require the payment of full compensation for a sovereign state's elimination by decree of the bank deposits of an alien?

3. Shall the federal judiciary be permitted to continue ignoring the plain language of the Foreign Assistance Act that principles of international law require the payment of full compensation for a foreign state's repudiation of contracts or nullification of agreements with a United States citizen?

PARTIES TO THE PROCEEDING

PETITIONERS:

George M. Davies
June H. Davies
Anthony J. Greco
Evelyn A. Greco
Norman D. Hughey
Donald S. Logan
Etta A. Logan
Attilio D. Rattaro
Ruth Rattaro
Vivian Serrano
Harvey Suddy
Leroy Swanson
Margaret Swanson
Adrienne S. Thompson
Philip B. Thompson
Roberto Vega
Jack West
George W. Williams
John S. Williams
(and all others similarly situated)

RESPONDENTS:

Banco Nacional de Mexico, S.A.
Bancomer, S.N.C.
Multibanco Comermex, S.A.
(each is an instrumentality of Mexico)

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The Ninth Circuit has decided a federal question of international importance in a manner contrary to the plain language and obvious purposes of the Securities Act of 1933.	4
As the single agency created and entrusted by Congress to administer	

the federal securities laws, the Securities and Exchange Commission long ago determined that the deposit instruments of Mexican banks were securities within the meaning of the Act. 8

In no way does Marine Bank v. Weaver support the decision below; its holding is inapposite. 11

Principles held determinitive by this Court establish that any instrument, taking traditional forms or not, when offered to the general public as an attractive investment and not specifically exempt, is a security for purposes of the federal securities laws. 15

The domestic marketing and sales of foreign bank deposit instruments through the mails violates the International Banking Act. 16

A sovereign state's elimination by decree of the bank deposits of an alien without payment of full compensation is a taking in violation of international law. 18

Congress has declared that principles of international law require the payment of full compensation for a foreign state's repudiation of contracts or nullification of agreements with a United States citizen. 28

This Court has decided that a foreign state's repudiation of a purely commercial obligation is neither an immune act of state nor subject to a claim of sovereign immunity; it is therefore compensable. 31

Under universally accepted principles of international law, neither the revenue laws nor the exchange control regulations of one foreign state are enforeceable in another. 34

Mexico's exchange control regulations violated the Articles of Agreement of the International Monetary Fund. 35

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OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is reproduced in the appendix, page 1 . The unreported order of the district court for the Northern District of California is reproduced in the appendix, page 47.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry was January 6, 1987. A timely petition for rehearing en banc was denied March 10, 1987; the order denying rehearing is reproduced in the appendix, page 50.

The statute conferring jurisdiction on this Court to review the judgment by writ of certiorari is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Securities Act of 1933, 15 U.S.C. §77 et seq., appendix, page 52.

Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611, appendix, page 55.

Foreign Assistance Act, 22 U.S.C. §2370(e)(1) and (2), appendix, page 59.

STATEMENT OF THE CASE

The bases for federal jurisdiction in the district court were the Securities Act of 1933, 15 U.S.C. §§77 l(1), (2), and v; and the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 et seq.

Beginning in the late 70's and continuing thereafter, respondent Mexican banks advertised in the United States and otherwise solicited American citizens and residents to invest U.S. dollars in both peso and dollar denominated fixed term bank accounts in Mexico. The banks promised particularly high interest yields on peso accounts, payable in dollars at the depositors' option, and the reconversion to dollars upon maturity. Promising competitive yields on dollar accounts, the banks guaranteed the payment of interest and return of principal in dollars; checks drawn upon United States banks were used to make all such payments.

Relying upon such information, petitioners, American citizens and residents, invested U.S. dollars by mail in the respondent Mexican banks and received in return uninsured, nonwithdrawable deposit receipts.

On February 17, 1982 Mexico's central bank abruptly ceased its intervention in the Mexican money market and the exchange value of the peso began plummeting; petitioners whose peso accounts matured thereafter were repaid far less upon reconversion of those accounts to dollars than the sums they had originally invested and notwithstanding the supposedly high interest yields.

On September 1, 1982 all Mexican banks including respondents were nationalized and a decree was issued that "Upon maturity, all bank deposits in foreign currency will be eliminated, and will be repaid at the rate of exchange set by the Banco de Mexico." The rate set was 70 pesos per dollar, whereas the prevailing rate of exchange, in

Mexico and worldwide, was invariably greater and as of this writing is more than 1,100 to 1. Thus, petitioners with dollar accounts suffered devastating losses.

The depositors instituted class actions claiming the banks had sold them unregistered securities in violation of the Securities Act of 1933, 15 U.S.C. §77 1(1), and had omitted material information in their offerings misleading the depositors in further violation of §77 1(2) of that Act. The dollar depositors also claimed their rights in property were taken in violation of international law because they were repaid in pesos at substantially less than the prevailing rate of exchange.

The district court entered summary judgment in favor of the Mexican banks and the court of appeals affirmed, holding the deposit instruments were not securities and the deposits were not taken in violation of international law.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION OF INTERNATIONAL IMPORTANCE IN A MANNER CONTRARY TO THE PLAIN LANGUAGE AND OBVIOUS PURPOSES OF THE SECURITIES ACT OF 1933.

Deposit instruments of foreign banks are both "evidence[s] of indebtedness" and "receipt[s] [there]for", each of which is included within the definitions of a security in the Securities Act of 1933 at 15 U.S.C. §77 (b)(1). Although literal inclusion has not necessarily been determinitive, it was recently held to be. Landreth v. Landreth, 105 S.Ct. 2297 (1985) declares,

> We here expressly leave until another day the question whether "notes" or "bonds" or some other category of instrument listed in the definition might be shown by proving the document itself ... We hold only that "stock" may be viewed as being in a category by itself for purposes of interpreting the scope of the Act's definition of "security".

See also, Securities Industry Association

v. Board of Governors, Federal Reserve System, 468 U.S. 207 (1984),

> Because commercial paper falls within the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with the Act's purposes, we conclude that commercial paper is a "security" under the Glass-Steagall Act ...

15 U.S.C. §77 c(a)(2) specifically exempts from the provisions of the Act securities issued or guaranteed by domestic banks:

> the term "bank" means any national bank, or any banking institution organized under the laws of any State.

The Act provides no exemption whatsoever for securities issued or guaranteed by foreign banks. As this Court noted in Securities Industry Ass'n, supra,

> ... each [securities] statute contains explicit exceptions when Congress meant for the provisions of an act not to apply ...

The Act has always applied to the securities of foreign governments, 15 U.S.C. §77 f(a), j(a)(2); see also, S.E.C. v. Chinese Bene-

volent Ass'n, 120 F.2d 738 (CA2 1941),

> the provisions for registration statements apply to issues of securities by a foreign government [cit.om.].

Suddenly to exempt the deposit instruments of foreign banks wholly owned by foreign governments from the registration provisions of the Act is also contrary to the 1982 amendments to the definitional section of the Act. Finding that,

> Financial instruments designed to speculate on, or hedge against, fluctuations in interest rates and exchange rates, as well as stock market movements and other economic changes have proliferated (emphasis added),

H.R. 97-626, reprinted at 1982 U.S. Code Cong. & Adm. News 2781, Congress added to the definitions of a security:

> any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency (emphasis added).

15 U.S.C. §77 b(1). The peso-denominated deposit instruments at issue here (as wellas the dollar-denominated instruments that were involuntarily converted to peso instruments)

were indeed "financial instruments designed to speculate on ... fluctuations in ... exchange rates" as well as "option[s] ... relating to foreign currency". Because the depositor could neither use, spend, borrow nor convert his deposit prior to maturity, all he had was an option to take possession, or sell a certain number of pesos at the rate of exchange prevailing on some future date. The depositor became a speculator in foreign currency, but without the kind of information the securities laws demand he be given; see, e.g., 17 C.F.R. §229.20, item 11, instruction 10.

What the Act provides is utterly clear; that its purpose was to protect the American public from the gigantic investment abuses to which it had been subjected by banks and corporations alike, both foreign and domestic, is equally clear; see, e.g., 77 Cong. Rec. 2610, 2611 (1933).

As this Court found in Randall v. Loftsgaarden, 106 S.Ct. 3143 (1986),

> But the 1933 Act is intended to do more than ensure that defrauded investors will be compensated: the Act also "aim[s] ... to prevent further exploitation of the public ... [and] to place adequate and true information before the investor. [cit. om.]

The decision below ignores those concerns; it also ignores the well established construction given the Act by the Securities and Exchange Commission.

AS THE SINGLE AGENCY CREATED AND ENTRUSTED BY CONGRESS TO ADMINISTER THE FEDERAL SECURITIES LAWS, THE SECURITIES AND EXCHANGE COMMISSION LONG AGO DETERMINED THAT THE DEPOSIT INSTRUMENTS OF MEXICAN BANKS WERE SECURITIES WITHIN THE MEANING OF THE ACT.

Securities Act Release No. 5739, September 7, 1976; 10 SEC Docket 406, declares:

> The Securities and Exchange Commission announced today that the SEC and Mexican financial authorities have reached an accord with respect to joint efforts by the SEC and the Mexican authorities to achieve compliance with the U.S.

and Mexican securities laws.

> In Securities Act Release No. 5698 (April 5, 1976), the SEC placed on the Foreign Restricted List the names of the following Mexican Financial institutions ("financiaras"): Credito Minero y Mercantil, S.A.; Financiera de Fomento Industrial, S.A.; Financiera Comermex, S.A. [Multibanco Comermex -- one of the respondents herein]; and Financiera Metropolitana, S.A. The SEC took the action when it received information that investors in the United States were being solicited to purchase and were purchasing promissory notes, certificates of deposit and other securities of the four financieras for which no registration statement had been filed pursuant to the provisions of the Securities Act of 1933 ("Securities Act"). Promissory notes, certificates of deposit and other securities of the financieras are securities under Section 2(1) of the Securities Act, and no exemption from registration is available with respect to such securities...

Obviously the accord was simply ignored by Mexico and its respondent banks.

It has also been the unqualified and long-standing position of the Securities and Exchange Commission that certificates of deposit and similar instruments issued by banking organizations that are not subject to domestic bank regulation are securities.

See, e.g., SEC v. Maxwell E. Meek, Civ. Act. No. 81-227-T (W.D. Okla.), Litigation Release No. 9307, March 3, 1981, 22 SEC Docket 388; SEC v. Liberty Loan Corp., Civ. Act. No. 76-304c (E.D. Mo.), Litigation Release No. 7356, April 13, 1976, 9 SEC Docket 446; SEC v. First American Bank & Trust Co., 481 F.2d 673 (CA8 1973). "... that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" has long been recognized by this Court, Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

Notwithstanding the plain language, obvious purposes, and specific interpretation of the Act by the SEC demanding that the deposit instruments at issue be held securities, the Ninth Circuit held they were not because of its misplaced reliance upon Marine Bank v. Weaver, 455 U.S. 551 (1982).

IN NO WAY DOES MARINE BANK v. WEAVER SUPPORT THE DECISION BELOW; ITS HOLDING IS INAPPOSITE.

Marine Bank v. Weaver held that an ordinary certificate of deposit, issued by a federally regulated domestic bank, and insured against loss by the Federal Deposit Insurance Corporation, was not a security for purposes of the antifraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78(c)(a)(10),

> This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation ... We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long term debt obligations. The Court of Appeals failed to give appropriate weight to the important fact that the purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency... It is unnecessary to subject issuers of bank

> certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. 455 U.S. 558.

The deposit instruments here were not issued by a federally regulated bank; the deposits were not insured by the FDIC nor by anyone else; the depositors did assume the risk of the borrowers' insolvency, were never guaranteed repayment in full; and, lacking any protection whatsoever under the federal banking laws, lost most of their deposits. Ignoring those realities, the court of appeals opined that the mere existence of Mexican bank regulation virtually guaranteed the depositors repayment in full to the same extent as depositors in U.S. banks, and concluded therefore that Marine Bank v. Weaver required it to hold that the deposit instruments at issue were not securities.

Fundamentally, neither the existence nor even the apparent adequacy of Mexican bank

regulation can ever protect an American depositor from the risks associated with devaluation and the imposition of exchange control regulations that severely diminish the value of the deposits. Such risks are never addressed by bank regulation but are risks the securities laws would require these foreign banks to specifically disclose, particularly describe, and otherwise warn investors about the dangers of.

Moreover, Marine Bank v. Weaver did conclude,

> It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a security as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. 455 U.S. 560, note 11.

Analysis and evaluation of the transactions at issue clearly reveals they were part and parcel of an international investment scheme, designed and promoted by the securities departments of respondent banks, directed at

literally millions of American offerees, specifically to attract the investment of their dollars across the border. To exempt the otherwise unregulated deposit instruments from the requirements of the federal securities laws is entirely inconsistent with Marine Bank v. Weaver.

The 1982 Congress recognized that case was confined to its own facts, that its key was domestic regulation, and that as a matter of law domestic certificates of deposit were still considered securities under the Investment Company Act; H.R. 97-626, reprinted at 1982 U.S. Code Cong. & Adm. News, 2788. Not only can the pretended safety allegedly provided by foreign bank regulation never be a valid substitute for the domestic regulation and everyday supervision of a bank and its instruments by agencies and pursuant to laws created by Congress that Marine Bank v. Weaver said made application of the securities laws there superfluous, it is

entirely irrelevant; see, Securities Industry Ass'n v. Board of Governors, supra,

> We do not doubt that the risk of default with commercial paper is relatively low - lower perhaps than with many bank loans ... however we find reliance on this characteristic misplaced ... there is little evidence to suggest that Congress intended the [Glass-Steagall] Act's prohibitions on underwriting to depend on the safety of particular securities ...

The judgment below is contrary to and inconsistent with other decisions of this Court.

PRINCIPLES HELD DETERMINITIVE BY THIS COURT ESTABLISH THAT ANY INSTRUMENT, TAKING TRADITIONAL FORMS OR NOT, WHEN OFFERED TO THE GENERAL PUBLIC AS AN ATTRACTIVE INVESTMENT AND NOT SPECIFICALLY EXEMPT, IS A SECURITY FOR PURPOSES OF THE FEDERAL SECURITIES LAWS.

See, e.g., SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943); SEC v. W.J. Howey Co., 328 U.S. 293 (1946); Tcherepnin v. Knight, 389 U.S. 332 (1967). See also, Landreth v. Landreth, supra; Paulsen v. Commissioner of Internal Revenue, 469 U.S. 131 (1985).

THE DOMESTIC MARKETING AND SALES OF FOREIGN BANK DEPOSIT INSTRUMENTS THROUGH THE MAILS VIOLATES THE INTERNATIONAL BANKING ACT.

The International Banking Act of 1978, 12 U.S.C. §§3102, et seq., governs foreign bank participation in the domestic market by providing for the establishment here of regulated branches of foreign banks desirous of conducting legitimate banking business with United States' citizens and residents. In particular, the Act requires that such banks must comply with the reserve, reporting, inspection, advertising, and all other regulations imposed upon domestic banks, 12 U.S.C. §3102(b), subject themselves to domestic bank rules of insolvency, 12 U.S.C. §3102(j)(1), and offer deposit insurance, 12 U.S.C. §3104.

Obviously, were the reserve, reporting, inspection and advertising requirements imposed upon foreign banks in their countries of origin deemed adequate by Congress for

the protection of American depositors, there would have been no need for this legislation; or, Congress could have provided an exemption for "well-regulated" foreign banks. Instead, it found that domestic supervision and control even over the operations of large, world-wide and otherwise well-regulated foreign banks was essential to the protection of American interests; S.R. 95-1073, reprinted 1978 U.S. Code Cong. & Adm. News pp. 1422, 1429, 1433.

Permitting foreign banks to evade this Act by deliberately failing to establish branches here while continuing to advertise, solicit, and accept deposits by mail, and at the same time escape registration of their deposit instruments under the securities laws because the banks are presumably well-regulated, is doubly repugnant to the will of Congress and must not be permitted to continue. These considerations alone demand review and reversal of the judgment below.

A SOVEREIGN STATE'S ELIMINATION BY DECREE OF THE BANK DEPOSITS OF AN ALIEN WITHOUT PAYMENT OF FULL COMPENSATION IS A TAKING IN VIOLATION OF INTERNATIONAL LAW.

Because the dollar deposits were involuntarily converted to pesos at far below the prevailing rates of exchange, there was not payment of full compensation here. Having first determined respondent banks were not entitled to sovereign immunity because of their commercial activities in the United States (28 U.S.C. §1605(a)(2)), the court of appeals next found they lacked sovereign immunity because rights in property taken in violation of international law were in issue (28 U.S.C. §1605(a)(3)). The court then held that Hickenlooper (22 U.S.C. §2370(e)(1) and (2)) precluded application of the act of state doctrine because the deposit instruments were property interests protected under international law, app'x, pp. 33-35. But it ruled no taking

in violation of international law had occurred because "Mexico's institution of exchange controls was an exercise of its basic authority to regulate its economic affairs." The court of appeals misses the point. As Professor Mann states, The Legal Aspect of Money, 4th Ed., at 472,

> The fact that the regulation of its currency falls within the State's sovereign jurisdiction does not mean that it is withdrawn from any control by international law.

It is precisely because the exercise of sovereign power sometimes infringes upon the rights of aliens that compensation becomes appropriate under international law. Indeed, a taking in violation of international law occurs when the exercise of sovereign power interferes significantly with the property or economic rights of an alien, and the state does not compensate him adequately for those rights -- exactly what happened here. The Restatement of

Foreign Relations Law 2d, §186 provides,

> Failure of a state to pay just compensation for taking the property of an alien is wrongful under international law regardless of whether the taking itself was wrongful under international law.

§188 continues,

> ... Under ordinary conditions ... the amount [of compensation] must be equivalent to the full value of the property taken ...

Nearly 50 years ago the United States and Mexico debated and determined that Mexico's taking of American citizens' property rights without the payment of adequate compensation was a taking in violation of international law and payment was made (see 56 Stat. 1347), despite the acknowledged exercise of Mexico's sovereign power to institute agrarian reform.

> The issue is not whether Mexico should pursue social and economic policies designed to improve the standard of living of its people. The issue is whether in pursuing them the property of American nationals may be taken by the Mexican Government without making prompt payment of just compensation to the owner in accordance with the universally recognized rules of law and equity ...

> The taking of property without compensation is not expropriation. It is confiscation ...

Note, the Honorable Cordell Hull, Secretary of State, to the Mexican Ambassador, July 21, 1938; 19 U.S. Dept. of State Press Releases, pages 50, 51.

> There is, indeed, no mystery about international law. It is nothing more than the recognition between nations of the rules of right and fair-dealing, such as ordinarily obtain between individuals, and which are essential for friendly intercourse ...
>
> The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations ...

Id., August 22, 1938, pages 139-141.

The court of appeals fixation on the word

"taking" in order to find that none had occurred is equally misplaced. In Allied Bank v. Banco Credito Agricola, 757 F.2d 516 (CA2 1985) the Second Circuit held that Costa Rica's imposition of currency control decrees (to regulate its economic affairs) that prevented its state-owned banks from repaying Allied pursuant to a loan agreement was insufficient as a matter of law to excuse the debt and ordered repayment in full:

> It seems clear that if the decrees are given effect and Allied's right to receive repayment in accordance with the agreement is thereby extinguished, a "taking" has occurred. (note 3)
>
> The property, of course, is Allied's right to receive repayment from the Costa Rican banks in accordance with the agreements.
>
> ... while Costa Rica has a legitimate concern in overseeing the debt situation of state-owned banks and in maintaining a stable economy, its interest in the contracts at issue is essentially limited to the extent to which it can unilaterally alter the payment terms ...
>
> The Costa Rican's government's unilateral attempt to repudiate private, commercial obligations is inconsistent with the orderly resolution of inter-

national debt problems. It is similarly contrary to the interests of the United States. [emphasis added]

As Allied pointed out, the Justice Department fully supported its holding. Giving controlling effect to Mexico's confiscatory exchange control regulations in United States courts conflicts with the international system of finance and its continued efficacy. International loan agreements, of which dollar deposits abroad are a significant part, must remain enforceable if world trade, commerce, and investment are to continue. Obviously, the unilateral repudiation of such agreements by the debtor bank or nation must be discouraged if further international lending is to continue. Inasmuch as the majority of the financing of developing nations is provided by the private commercial sector, its continuation is critical in alleviating the financial burdens of heavily indebted nations. The individual American or corporate citizen who loans or deposits

dollars abroad in good faith is legally entitled to no less protection from our legal system than the commercial bank that does so. Central to this theme, it has been the official position of the United States Government for at least the past forty years to encourage and support the restructuring and rescheduling of international indebtedness of financially troubled nations in sharp and distinct contrast to condoning the repudiation of such indebtedness. It is consistent therewith, and indeed civilized order demands, that unless a creditor public or private consents, his right to repayment in full must remain inviolate. This process of voluntary accommodation is impaired by judicial recognition of the unilateral repudiation of any international debt. The judicial recognition below of Mexico's unilateral repudiation of the private commercial obligations of respondent banks is repugnant to the entire system of international fin-

ance; and, unless reviewed, will undermine that system. Such recognition is also repugnant to the legal concepts of debt, bargain and contract long recognized throughout the civilized world.

McDonald, Sommer & Frates v. Yolo County, 106 S.Ct. 2561 (1986) recently recognized that regulations may constitute takings for Fifth and Fourteenth Amendment purposes if they go too far.

> Our cases have accordingly examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors - such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action - that have particular significance.

Earlier, United States v. General Motors, 323 U.S. 373 (1945) explained,

> The critical terms are "property," "taken" and "just compensation" ... Property ... denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it ... deprivation of the former owner rather than the accretion of a

> right or interest to the sovereign constitutes the taking ... compensation to be paid is the value of the interest taken ... the owner must be put in as good position pecuniarily as if his property had not been taken ...

Here, there can be no question that the elimination of the dollar deposits, the actual retention of those deposits by the respondent banks, and their failure to pay the prevailing rates of exchange, so depleted the depositors' funds, and so diminished the use, possession and enjoyment thereof, that a taking most surely occurred.

The so-called commentators to the contrary cited by the court of appeals do not support its conclusion. Professor Christie, XXXVIII Brit. Y. B. Int'l Law, 337-8 (1962) wrote,

> Although most interference with property, particularly if it is general in nature, can be clothed under the rubric of some recognized social purpose, the cases have clearly indicated that a State's mere declaration that expropriation is not intended is not determinitive of the issue ...
>
> When coupled with other interferences with the use of property, however, the

> refusal to permit transfer of funds abroad is a relevant factor in determining whether expropriation has occurred from the combined effect of all the interference imposed on an alien's use of his property ...
>
> Where a State compels an alien to sell his property for less than its true value either to the State or to a third party, a compensatable claim arises ...

The Foreign Claims Settlement Commission of the United States, Decisions and Annotations pp. 343, 406, considered very similar cases:

> The Commission found that ... on December 28, 1917 such severe restrictions were imposed upon withdrawals from bank accounts as to prevent depositors residing outside of Russia and holders of large deposits in general from withdrawing funds. This action was deemed to be a taking of the bank accounts on December 28, 1917 and was the basis for awards. (Claim of Allis-Chalmers Manufacturing Company, Claim No. SOV-41857, Dec. No. SOV-2476, 10 FCSC Semiann. Rep. 209 (Jan.-June 1959).)
>
> In 1947 all such accounts [in old Koruna deposits in Czechoslovakia] were transferred to a special Currency Liquidation Fund, and were annulled ... The Commission held ... that the annulment ... of all bank accounts ... was a taking of property ... (Claim of John Stipkala, Claim No. CZ-1616, Dec. No. CZ-135, 17 FCSC Semiann. Rep. 191 (July-Dec. 1962).

Wortley, Expropriation in Public International Law (1959), p. 108 observes,

> *Although persons using foreign money* may be taken to risk market fluctuations in its value, there is no reason why they should be presumed to have agreed to allow themselves to be expropriated by the results of foreign exchange control or currency legislation.

Indeed, when, as here, the depositors were specifically and unconditionally guaranteed repayment of their deposits in U.S. dollars, no risk whatsoever that those deposits might instead be taken may be presumed. More important, the repudiation of those deposit agreements unaccompanied by the payment of full compensation itself constitutes a violation of international law.

CONGRESS HAS DECLARED THAT PRINCIPLES OF INTERNATIONAL LAW REQUIRE THE PAYMENT OF FULL COMPENSATION FOR A FOREIGN STATE'S REPUDIATION OF CONTRACTS OR NULLIFICATION OF AGREEMENTS WITH A UNITED STATES CITIZEN.

The Foreign Assistance Act, 22 U.S.C. §2370 (e)(1) provides,

> The President shall suspend assistance to the government of any other country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country ...
>
> (A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen ... or
>
> (B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen ...
>
> (C) ... or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,
>
> and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action ...) to take appropriate steps ... to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law ... (emphasis added).

The Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. §2370(e)(2) abolishes the act of state defense in actions by a United States citizen seeking enforce-

ment of his rights to full compensation under international law. As Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1541 (CADC 1984)(en banc); remanded due to intervening legislation, 105 S.Ct. 2353 held,

> The statutory standards which the foreign state must meet - before a court may apply the act of state doctrine - include speedy compensation equivalent to the full value of the confiscated economic interest. (emphasis in original).

Although the court of appeals found the act of state doctrine inapplicable, it failed to recognize that the plain language of the Act clearly would include the taking of "steps to repudiate or nullify existing contracts or agreements with any United States citizen", i.e. repudiation of the dollar deposit agreements, without payment of "compensation for such property in convertible foreign exchange [pesos], equivalent to the full value thereof, as required by international law", as violations of international law or as takings in violation

thereof. The whole tenor of the Act makes that clear. Congress, of course, has the Constitutional power to define principles of international law; see, Art. I, Sec. 8, Cl. 10, United States Constitution; see also, First National City Bank v. Banco Para El Comercio, 462 U.S. 611 (1983) confirming such Conressional authority. The court of appeals was no more free to ignore those principles than it was free to ignore an opinion of this Court.

THIS COURT HAS DECIDED THAT A FOREIGN STATE'S REPUDIATION OF A PURELY COMMERCIAL OBLIGATION IS NEITHER AN IMMUNE ACT OF STATE NOR SUBJECT TO A CLAIM OF SOVEREIGN IMMUNITY; IT IS THEREFORE COMPENSABLE.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) declared:

> ... the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.

> Repudiation of a commercial debt cannot, consistent with the restrictive approach to sovereign immunity, be treated as an act of state; for it it were, foreign governments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our Government would not extend them under prevailing sovereign immunity principles in this country. This would undermine the policy supporting the restrictive view of immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible.
>
> For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign immunity." (plurality opinion).

The court of appeals held (app'x pp. 15-16),

> Here, as in Callejo, the defendants engaged in a regular course of commercial conduct in the United States and it was certainly forseeable at the time of the solicitations that their commercial activities would subject them to suit. Moreover, that defendants were "prevented from complying with [their] contract[s] by a governmental decree flatly prohibiting the use of dollars as legal tender does not make [them] immune from suit as an agent of the Republic of Mexico"

> acting in a sovereign capacity. Braka, 589 F.Supp. at 1470. See also Callejo, 764 F.2d at 1110 ("In the present case, Bancomer did not act as an agent of the Mexican Government in implementing the exchange regulations; instead, it acted as any private party would in complying with the law."); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391 (5th Cir. 1985) ("[A]lthough the promulgation of the exchange regulations ... was a sovereign act ... the relevant acts of the defendant [in Callejo] consisted merely of selling and later breaching the certificates.").

The purely commercial acts of the respondent banks consisted merely of selling and later breaching the certificates of deposit; absent immunity and lacking any other defense, liability for those breaches must surely follow. In Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F.Supp. 870 (SDNY 1983), a consortium of mostly foreign banks prevailed in a suit to recover a 40 million dollar loan to a Costa Rican bank; the defense was that Costa Rica's currency control regulations effectively prevented repayment.

> The property in question in this case is plaintiffs' legal right to repayment

> of the debt owed by the defendant. The Costa Rican decrees purport to alter the legal relations of the parties because they attempt to extinguish plaintiffs' rights ... [D]efendant has submitted no authority for its view that a contract, valid and enforceable when made, may be rendered unenforceable by an intervening currency regulation. Indeed, there is authority in support of the contrary view [cits. om.].

Similarly, J. Zeevi & Sons, Ltd. v. Grindlays Bank, 333 N.E.2d 168 (N.Y.Ct.App. 1975), ignored its earlier 4-3 opinion in French v. Banco Nacional de Cuba, 242 N.E.2d 704 (1968) and ordered enforced a Grindlays Bank letter of credit invalidated by a currency regulation.

UNDER UNIVERSALLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW, NEITHER THE REVENUE LAWS NOR THE EXCHANGE CONTROL REGULATIONS OF ONE FOREIGN STATE ARE ENFORCEABLE IN ANOTHER.

Banco Do Brazil v. Israel Com. Co., 139 N. Y.S.2d 872 (1963); Menendez v. Saks, 485 F.2d 1355, 1366, (CA2 1973); rev'd on other grounds sub. nom. Dunhill, supra; 15 Va.J. Int'l Law 372; Banco Nacional de Cuba v. Sab-

batino, 376 U.S. 398, 413, 414 (1964); Mann, The Legal Aspect of Money, 4th Ed., 428-9. As Professor Mann has written, even where (as here) such regulations are presented as a "defence", they ought to fail; Id. at 431. Consistent therewith, the Articles of Agreement of the International Monetary Fund do not require "recognition and enforcement of exchange control legislation among members", Mann, The Legal Aspect of Money, 3d Ed., 434. Violation of the Argeement, on the other hand, may "require the rejection of a foreign State's exchange restrictions", Id.

MEXICO'S EXCHANGE CONTROL REGULATIONS VIOLATED THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND.

The Agreement provides that members shall not "impose restrictions on the making of payments and transfers for current international transactions", Art. VIII, Sec. 2 (a), which includes "normal short-term

banking", Art. XIX(i); nor "engage in ... any discriminatory currency arrangements or multiple currency practices ...", Art. VIII, Sec. 3. Clearly, the principal payments that were due upon maturity of the dollar accounts were payments for current international transactions, e.g., short-term banking. Those payments were not merely restricted, they were "eliminated". Thus, the regulations violated Art. VIII §2(a). The 70 peso rate of exchange at which the dollar deposits were involuntarily converted was always alarmingly less than the prevailing rate of exchange in Mexico and world-wide; that was both a discriminatory currency arrangement and a multiple currency practice in separate violation of Art. VIII, §3. Those violations are additional reasons why the regulations must be rejected as a defense in the cases at bar.

When the legal director of the International Monetary Fund indicated in another case

that Mexico's regulations did not violate the fund Agreement, he was referring to those particular regulations that Mexico enacted August 12, 1982 and repealed September 1, 1982 requiring conversion of foreign currency deposits at the prevailing rates of exchange. He was not referring to the regulations at issue requiring conversion at the fixed rate of 70 pesos per dollar no matter what the prevailing rate might be. That is a part of the record in this case. Any of Mexico's legitimate goals could have been accomplished by the payment of fair value for the dollar deposits.

CONCLUSION

It is essential for the courts to recognize what the Executive Branch and the Congress have both acknowledged, see, e.g., 1978 Digest of U.S. Practice in Int'l Law 1226-7; 22 U.S.C. §283r., §285o., §290g-8: In addition to those acts that historically have

constituted takings in violation of international law, other fully developed principles of international law require the payment of full compensation for actions that have the same effect as a taking; and, more specifically, require the payment of full compensation for "a repudiation or breach by the state of a contract with a national of another state", ALI Restatement of the Law of Foreign Relations §712 (Tent. Draft No. 7; April 10, 1986); see also, Alfred Dunhill of London v. Republic of Cuba, supra. Surely application of accepted principles of international law cannot turn on the identity of the foreign state charged with their violation.

The class actions at bar will finally determine whether the many thousands of United States citizens who lost many millions of dollars are entitled to the protections guaranteed them by international law and by no fewer than three Congressional Acts --

Securities Act of 1933, the International Banking Act, and the Foreign Assistance Act -- they will determine as well whether or not other foreign banks and states are now free to engage in similar acts causing similar losses with absolute impunity. Almost every bank on earth is "well-regulated"; certainly every state's exchange control decrees are adopted "to regulate its economic affairs"; whether or not such "considerations" alone are truly sufficient to nullify protections otherwise guaranteed to its citizens by this nation of laws is a question that deserves to be settled by this Court. For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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Supreme Court, U.S.
FILED
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CLERK

86-1648
NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON,
GEORGE M. DAVIES, ET AL.,
PETITIONERS,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C.,
and BANCO NACIONAL DE MEXICO, S.A.,
RESPONDENTS.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK WEST, et al., Plaintiffs-Appellants, vs. MULTIBANCO COMERMEX, S.A., Defendant-Appellee.	NO. 85-2162
PHILIP B. THOMPSON, et al., Plaintiffs-Appellants, vs. BANCOMER, S.N.C., Defendant-Appellee.	NO. 85-2163
GEORGE M. DAVIES, et al., Plaintiffs-Appellants, vs. BANCO NACIONAL DE MEXICO, S.A., Defendant-Appellee.	NO. 85-2164

OPINION, January 6, 1987

Before: GOODWIN, HUG, and REINHARDT, Circuit Judges

REINHARDT, Circuit Judge:

In these consolidated cases, plaintiffs, individual U.S. investors who purchased peso- and dollar-denominated certificates of deposit from defendant banks, appeal the district court's grant of a motion for summary judgment. We affirm.

Jack West and his fellow investors responded to solicitations inviting U.S. citizens and residents to purchase peso- and dollar-denominated certificates of deposit issued by Mexican banks. Beginning in 1979, for example, Banamex mailed a brochure entitled Mexico's Other Great Climate ... Investment to numerous persons in the United States, encouraging investment in these accounts. The Mexican banks offered high rates of return, especially in the peso accounts, for term certificates of deposit. At the time of the solicitations and initial invest-

ments, the banks were privately owned.

In the late 1970's, in order to support its domestic spending programs, Mexico began to borrow extensively from both public and private foreign organizations. This borrowing was predicated upon the assumption that Mexico's oil reserves would generate sufficient revenues to meet its debt service. These oil revenues were Mexico's primary source of foreign currency. In August 1982, as the price of world oil fell significantly, the Government of Mexico experienced a serious deficiency in the foreign currency reserves it needed to repay its debts. Accordingly, it instituted a program of exchange control regulations designed to provide it with greater ability to monitor and maintain the exchange value of the peso.

The Government of Mexico issued a number of decrees beginning in mid-August 1982 that affected certificates of deposit in Mexican banks, including those certificates held by

the U.S. plaintiffs. On August 12, 1982, exchange control regulations were promulgated, preventing holders of certificates of deposit from receiving payment in currency other than the peso. These regulations provided that the conversion of foreign exchange accounts was to be at the rate of exchange prevailing at the time and place when payment of the certificates was due. Moreover, the decrees prohibited use of foreign currency as legal tender and banned the transfer of dollars abroad.

On September 1, 1982, President Lopez Portillo signed two additional decrees in an attempt to respond to the financial crisis facing his nation. First, the Government nationalized the entire private banking system. Second, the government issued more comprehensive exchange controls including a provision eliminating all bank deposits in foreign currency and specifying that repayment of those deposits were to be made in

pesos at a rate of exchange to be determined by Banco de Mexico, Mexico's central bank.

When the dollar certificates of deposit matured following nationalization and the adoption of exchange controls, Multibanco Comermex converted those accounts at the specified rate of 70 pesos to the dollar. Other banks implemented the conversion policy in a similar manner. According to the plaintiffs, one account was converted into approximately 6½ million pesos which, when reconverted back into dollars in the United States at the then prevailing rate of 112 to 1, resulted in a net loss of principal of approximately one-third or $32.800.

The peso accounts remained in domestic currency. However, because there was an abrupt and unanticipated decline in value on the world market, plaintiffs with peso accounts suffered substantial losses. Those losses were realized when the peso accounts were converted to dollars in the United

States. Each of the plaintiffs in these consolidated cases suffered losses of one type or the other -- or both.

Plaintiffs filed these actions in federal district court alleging (1) violations of the federal securities laws, 15 U.S.C. §77 et seq, for the sale and issuance of unregistered securities through interstate commerce and (2) a taking of property (the dollar-denominated certificates of deposit) by a foreign state in violation of international law. Defendants moved to dismiss the actions pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Because the motion was accompanied by affidavits and other supporting documents, the district court properly considered the motion as one for summary judgment.

The district court held that plaintiffs' securities law claims were controlled by this court's decision in Wolf v. Banco National de Mexico, S.A., (Banamex), 739 F.2d

1458 (9th Cir. 1984), cert. denied, 105 S. Ct. 784 (1985), which held that certificates of deposit issued by Mexican banks were not "securities." The district court also ruled that the takings claim was barred under the act of state doctrine. Accordingly, it granted defendant banks' motions. West and his fellow U.S. investors appeal. We affirm, although for somewhat different reasons.

I. Jurisdiction

All three defendants in these consolidated cases are currently instrumentalities of the government of Mexico and hence may be entitled to assert sovereign immunity. Multibanco Comermex S.A., Bancomer S.N.C., and Banco Nacional de Mexico S.A. (Banamex) were nationalized by the government of Mexico on September 1, 1982. The federal courts have original jurisdiction over foreign states under 28 U.S.C. §1330 (1982), unless the state is entitled to immunity under

28 U.S.C. §§1602 - 1611 (1982), the Foreign Sovereign Immunities Act (FSIA).

FSIA governs the determination of sovereign immunity of foreign entities. Claims of sovereign immunity present the theoretical conflict between "the municipal rights of the citizens whose protection defines sovereign authority and the international rights of the foreign sovereign whose reciprocal respect defines [domestic] sovereignty as well."[1] The Supreme Court has recently said that "foreign sovereign immunity is a matter of grace and comity on the part of the United States." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

There are two basic theories of sovereign immunity, absolute and restrictive. The latter approach has gained the favor of most nations internationally and has been the policy of the United States since 1952. "Absolute" immunity means that if there is

formal involvement in the activity in question by a foreign sovereign, such involvement renders that activity immune from scrutiny by domestic courts. The original and most important formulation of the absolute theory was by Chief Justice John Marshall in the Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). Marshall's opinion emphasized sovereign equality, and ruled that foreign nations were in their essence immune from the exercise of jurisdiction by our courts.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every [domestic] sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 136 (footnote omitted). Marshall's twin concepts of absolute territorial sovereignty and absolute immunity of foreign sovereigns based upon the implied consent

of the United States prevailed for a century and a half.

In 1952, the Department of State changed its position on the granting of sovereign immunity to foreign governments. The new policy was announced in a letter from the Department's Acting Legal Advisor Jack B. Tate to the Acting Attorney General, Philip Perlman, dated May 19, 1952 (the "Tate letter"). This letter announced the adoption of the so-called "restrictive theory" of sovereign immunity. As opposed to the absolute theory in which tangential involvement of a foreign sovereign was sufficient to prevent U.S. courts from exercising jurisdiction, in "the newer or restrictive theory ... the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestonis)." Tate, Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments,

26 Dep't St. Bull. 984 (1952).

Until the enactment of FSIA in 1976, the Department of State made case-by-case decisions as to whether immunity was appropriate. Congress replaced this method of determining sovereign immunity by "codif-[ying], as a matter of federal law, the restrictive theory." Verlinden. 461 U.S. at 488. FSIA empowers courts to determine the appropriateness of immunity as a legal question. See 28 U.S.C. §1602; H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 7 (1976), reprinted in 1976 United States Code Cong. & Admin. News, 6604, 6605.

Under the restrictive theory, actions not in a sovereign capacity are subject to the jurisdiction of U.S. courts (assuming the existence of the other requisite elements of jurisdiction). Nonetheless, the presumption under FSIA is that actions taken by foreign states or their instrumentalities are sovereign acts and thus protected from

the exercise of our jurisdiction, unless one of the enumerated exceptions to FSIA applies. 28 U.S.C. §§1605(a)(1-5) & (b). When an exception to immunity is found, the state or instrumentality is liable to the same extent as a private person, except that punitive damages are not available against the state. 28 U.S.C. §1606. Plaintiffs contend that two exceptions are applicable here: first that the banks' activities are "commercial" and, second, that the institution of exchange controls resulting in the elimination of dollar accounts constitutes a "[taking of property] in violation of international law." See 28 U.S.C. §§1605 (a)(2) & (a)(3).

Commercial activities of foreign states or their instrumentalities are not "sovereign acts" within the meaning of the restrictive theory of sovereign immunity and are the subject of a specific exception in FSIA. See 28 U.S.C. §1605(a)(2). The House Report to FSIA notes that the "commercial activity"

exception applies to "a commercial transaction or act having a 'substantial contact' with the United States." H.R. Rep. No. 1487 at 17, reprinted in 1976 United States Code Cong. & Admin. News at 6616. In Wolf v. Banco Nacional de Mexico, S.A. (Banamex), 739 F.2d 1458 (9th Cir. 1984), cert. denied 105 S.Ct. 784 (1985), we held that "the sale of the certificate of deposit by Banamex to Wolf was clearly 'a commercial activity carried on in the United States by Banamex, within the meaning of §1605(a)(2)." Id. at 1460. Wolf involved substantially identical issues to the present appeal and many of the same parties.[2] Here, as in Wolf, the banks solicited, marketed, and generally encouraged U.S. investors to deposit monies in their banks and promised investors extraordinary rates of return.

The defendants assert, however, that the Mexican banks "performed a critical role in the implementation of tne currency control

program applicable throughout Mexico [and thus] ... it cannot be said that ths action is based on commercial activity." Although arguably foreclosed by Wolf, we will dispose of this issue on the merits since the same result obtains. It is correct, as the defendants suggest, that the "issue under the FSIA is to determine whether the act of the named defendant was performed in a sovereign or a commercial capacity." Braka v. Bancomer, S.A., 589 F.Supp. 1465, 1469 (S.D.N.Y. 1984) (Sofaer, J.), aff'd, 762 F.2d 222 (2d. Cir. 1985). However, a finding of sovereign immunity is warranted only where the "activity in question is [not] one which private parties ordinarily perform [but is] peculiarly within the realm of governments." Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 53

(1976) (statement of Monroe Leigh, Legal Advisor, U.S. Dep't of State). Sovereign immunity is determined not only by the character of the actor, but also by the nature of the act.

We agree with the analysis of the Fifth Circuit in Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985). There plaintiffs also sought to challenge sovereign immunity, relying as it does here, on its compliance with Mexico's exchange control regulations. After noting that Bancomer was a government instrumentality, the Callejo court stated, "[this] action arose as a result of Bancomer's commercial banking activities ... [which] had a direct effect in the United States." Callejo, 764 F.2d at 1107. Here, as in Callejo, the defendants engaged in a regular course of commercial conduct in the United States and it was certainly forseeable at the time of the solicitations that their commercial activities would subject them to

suit. Moreover, that defendants were "prevented from complying with [their] contract[s] by a governmental decree flatly prohibiting the use of dollars as legal tender does not make [them] immune from suit as an agent of the Republic of Mexico" acting in a sovereign capactiy. Braka, 589 F.Supp. at 1470. See also Callejo, 764 F.2d at 1110 ("In the present case, Bancomer did not act as an agent of the Mexican Government in implementing the exchange regulations; instead, it acted as any private party would in complying with the law."); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391 (5th Cir. 1985)("[A]lthough the promulgation of the exchange regulations ... was a sovereign act, ... the relevant acts of the defendant [in Callejo] consisted merely of selling and later breaching the certificates."). Cf. Town of Hallie v. City of Eau Claire, 105 S.Ct. 1713 (1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,

445 U.S. 97 (1980) (standards for state action antitrust immunity for public and private actors).

West's securities claim is based upon the alleged material breach of his contract with the banks; the fact that the defendants were implementing exchange controls goes to whether that breach should be excused and not to whether this Court has jurisdiction. Thus, the defendants are not entitled to immunity from suit on the securities claim.

West asserts that we have jurisdiction over the expropriation claim pursuant to 28 U.S.C. §1605(a)(3), the takings exception. A foreign state is not immune from the exercise of our jurisdiction in a case "in which rights in property taken in violation of international law are in issue." 28 U.S.C. §1605(a)(3). This exception is based upon the general presumption that states abide by international law and, hence, violations of international law are not "sovereign" acts.

West's claim here is that the conversion of the dollar accounts was an unlawful taking. Because the claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction, even though we ultimately rule against the plaintiffs on the merits. See Bell v. Hood, 327 U.S. 678, 683 (1946).[3] See also Restatement of Foreign Relations Law of the United States (Revised), §455 comment c (Tent. Draft No. 2, 1981)[Hereinafter Restatement, draft number, and date] (28 U.S.C. §1605(a)(3) applies to "claims to compensation for taking").

Thus, the district court and this court properly have jurisdiction over this action consistent with FSIA.[4]

II. Securities Claim

A. Applicable Law

West contends that the certificates of deposit he purchased should be considered to be "securities" within the meaning of

federal securities law. Preliminarily we note that "the nature of an instrument is to be determined at the time of issuance, not at some subsequent time." Great Western Bank & Trust v. Kotz, 532 F.2d 1252, 1255 (9th Cir. 1976). The plaintiffs argue that because the defendant banks did not comply with the federal regulatory scheme governing securities, they are liable for the losses occasioned by the devaluation of Mexican pesos and the losses associated with the conversion of the dollar accounts to pesos.

The defendants assert that this Court's decision in Wolf v. Banco Nacional de Mexico, S.A. (Banamex), 739 F.2d 1458 (9th Cir. 1984), cert. denied, 105 S.Ct. 784 (1985), controls the disposition of this claim. That case was based upon the Supreme Court's decision in Marine Bank v. Weaver, 455 U.S. 551 (1982), which held that certificates of deposit issued by a domestic bank were not "securities"

within the meaning of 15 U.S.C. §78 and thus were exempt from the strict requirements of that regulatory scheme. The Court in Weaver noted that "the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency," whereas the "purchaser of a certificate of deposit is virtually guaranteed payment in full" by the scheme of federal banking statutes. 455 U.S. at 558. Because holders of certificates of deposit were "abundantly protected" against the risk that a bank would become insolvent, those financial isntruments were held not to be "securities". 455 U.S. at 559.

Our decision in Wolf was based primarily on the "insolvency protection" provided by the system of Mexican regulation governing the operation of its banks. Briefly, that system included: 1) the supervision of banks by Banco de Mexico, the National Banking Commission, and the Ministry

of Public Finance and Public Credit; 2) paid-in capital and reserve requirements; 3) authority of the National Banking Commission over advertising; 4) requirements for annual audits and for submission of monthly financial statements to the National Banking Commission; and 5) "preferential" legal status for claims against insolvent banks. We also considered the fact that no Mexican bank had failed for fifty years. Accordingly, we held that "[t]he depositors in a Mexican bank ... have been '*virtually guaranteed*' of repayment in full to the same degree as those in United States banks ..." 739 F.2d at 1463 (emphasis added). Thus, the certificates of deposit were held not to be "securities." In reaching our conclusion, we said that "[w]hether a bank's certificate of deposit is a security surely cannot turn on the currency with which it is purchased or in which it is payable." *Id.* at 1462.

In *Wolf*, "it was *conceded* that the

Mexican government's regulation ... provides ... certificate holders the same degree of protection against insolvency as does the federal system in this country." Id. at 1463 (emphasis added). Here, plaintiffs not only make no similar concession but vigorously challenge the conclusion reached in Wolf. They claim that while on paper the regulatory structure may provide adequate protection, Mexican officials are neither complying with nor enforcing their own laws. Thus, they say, there is in fact no "insolvency protection" afforded under the Mexican regulatory system. According to the plaintiffs, these circumstances render our holding in Wolf inapplicable.

West does not seek relief under Mexican law for the action of government officials in violating their own laws; rather, he contends that the officials' conduct is relevant in determining the question of the actual protection afforded to investors under the

regulatory scheme. According to the plaintiffs, if the scheme of regulation as applied does not satisfy the insolvency protection test, the certificates of deposit should be considered to be "securities."

We held in Wolf that U.S. law was applicable in determining the nature of the instruments in question. A necessary incident to that holding is that U.S. law is applicable to any examination of the factual predicates to our legal conclusions -- here, the manner in which the Mexican regulations are being administered or enforced. Cf. Fiske v. Kansas, 274 U.S. 380, 385-86 (1927) ("where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," independent review is appropriate). Accordingly, U.S. law would be applicable to the question whether Mexican officials in fact are violating their own

law in the nonenforcement or misenforcement of the regulatory structure and, derivatively, to the question whether such conduct would require a reconsideration of our holding in Wolf that certificates of deposit in Mexican banks are virtually guaranteed of repayment. However, the scope of our inquiry into the actions of foreign governments is limited by the act of state doctrine. In this case, that doctrine prevents us from scrutinizing the alleged nonfeasance or misfeasance of the Mexican officials charged with enforcing their country's banking laws.

B. Act of State Doctrine

The act of state doctrine is a combination justiciability and abstention rule developed in pre-Erie days and reaffirmed in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). It prohibits U.S. courts from reaching the merits of an issue -- even though we otherwise have jurisdiction -- in

order to avoid embarrassment of foreign governments in politically sensitive matters and interference with the conduct of our own foreign policy. See e.g., International Association of Machinists & Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). The classic statement of the doctrine is found in Underhill v. Hernandez, 168 U.S. 250 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Id. at 252. The public capacity of the actors involved in the suit or the governmental acts of a nondefendant state (if called into question) may serve to trigger the act of state doctrine. See, e.g., DeRoburt v. Gannett Co., Inc., 733 F.2d 701 (9th Cir. 1984), cert. denied, 105 S.Ct. 909 (1985). In general, "[w]hen the causal

chain between defendant's alleged conduct and plaintiff's injury could not be determined without an inquiry into the motives of the foreign government, the defense has been successful ..." Restatement, §469, comment 7 (Tent. Draft No. 7, 1986).

The plaintiffs here challenge the compliance of Mexican officials with enforcement provisions of the Mexican regulatory scheme. The acts or omissions of the sovereign is the determinitive issue on this claim.[5] The evaluation by one sovereign of foreign officers' compliance with their own laws would, at least in the absence of the foreign sovereign's consent, intrude upon that state's coequal status. See, e.g., Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406-7 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). Thus, furthe. inquiry into the actual operation of the nationalized Mexican banking system to the extent that it implicates the

non-compliance of officials with their own laws is barred under the act of state doctrine.[6] See, e.g., Timberlane Lumber Co., v. Bank of America National Trust & Savings Ass'n, 549 F.2d 597 (9th Cir. 1976).

Wolf requires that in order for a foreign bank offering certificates of deposit to be exempt from the registration and disclosure requirements of U.S. securities law, the foreign government must have adopted a comprehensive regulatory scheme governing banking operations that "virtually guarantees" repayment to purchasers of such certificates. Although "the trial court must hear evidence on the degree of protection that structure offers a depositor against insolvency," 739 F.2d at 1463, it may not examine the actual operations of the regulatory system to the extent that such inquiry would directly implicate the failure (whether willful or negligent) of officers of the foreign state to enforce

their own laws, at least in the absence of consent of the foreign sovereign. As a matter of comity, we presume that Mexican officials are acting in a manner consistent with the requirements of Mexican law.[7]

Here, the only question as to the adequacy of the Mexican regulatory structure is the compliance of Mexican officials with the requirements of Mexican law. Because our inquiry into the foreign officials' actions is barred by the act of state doctrine, our holding in Wolf that the certificates of deposit issued by Mexican banks are not "securities" is applicable. Since the certificates were not subject to the requirements of U.S. securities law, the plaintiffs cannot prevail on their securities law claim.

III. Takings Claim

West claims that the 'conversion' of his dollar-denominated certificate of deposit to pesos at a rate of exchange specified by the government -- a rate less than

the market rate of exchange -- was a taking of his property in violation of international law. This is an expropriation claim. Before reaching the merits of that claim, we must again consider the applicability of the act of state doctrine and determine whether it is permissible for us to examine the challenged actions of the Mexican government.

1. Act of State and the Hickenlooper Amendment

Ordinarily, the act of state doctrine would be applicable here for all the reasons discussed in the "securities claim" section supra. However, Congress has adopted a specific statutory provision requiring federal courts to examine the merits of controversies involving expropriation claims. The so-called Second Hickenlooper Amendment, 22 U.S.C. §2370(e)(2)(1982), overrides the judicially developed doctrine of act of state. Hickenlooper was passed in response to the Supreme Court's decision in Banco

Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), which barred adjudication of an expropriation claim on act of state grounds. The amendment states in part:

> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party ... based upon (or traced through) a confiscation or other taking ... by an act of that state in violation of the principles of international law, including the principles of compensation ...

22 U.S.C. §2370(e)(2). When Hickenlooper governs, courts are barred from invoking the judicially created doctrine under which we refrain from consideration of cases involving acts of foreign governments or foreign officials.[8]

Defendants argue that Hickenlooper is inapplicable because rights arising out of ownership of certificates of deposit are contractual, and hence not 'tangible property' which can be taken by expropriation within the meaning of the amendment. Al-

though this proposition finds support in case law, e.g., French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968), it is based largely upon an overly formalistic attachment to private law categories and is contrary to the motivating policies of the Hickenlooper Amendment.

Defendants' construction would unnecessarily restrict the scope of Hickenlooper. As the District of Columbia Circuit has noted, the "broad, unqualified language of the carefully drafted amendment" should not be undermined by the importation of external constraints on interpretation. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1542 n. 180 (D.C. Cir. 1984)(en banc). vacated and remanded because of subsequent legislation, 105 S.Ct. 2353 (1985). The legislative history to Hickenlooper supports the rejection of a constricted interpretation and makes it clear that the protection afforded U.S. investments was to be broad in

scope:

> The sponsors of the amendment referred to it as the "Rule of Law" amendment; they viewed it as authorizing courts to apply established law [in] suits challenging expropriations. Congressional intent to overrule Sabbatino was never limited to a single narrow class of cases. The purposes of the amendment include the promotion and protection of United States investment in foreign countries (which characteristically has always principally been land, minerals, and large fixed immovables), and securing the right of a property holder to a court hearing on the merits.

Id. See also Foreign Assistance Act: Hearings on H.R. 7750 Before the Committee on Foreign Affairs, 89th Cong., 1st Sess. 592, 607-10 (1965).

Moreover, the tangible/intangible characterization of property interests, urged by the defendants, is a distinction without a difference. This distinction is not generally recognized in international, federal, or state law. See Christie, What Constitutes a Taking of Property Under International Law?, 38 Brit. Y.B. Int'l L. 307, 318-19 (1964)("contract and many other so-

called intangible rights can, under certain circumstances, be expropriated"); Oakland v. Oakland Raiders (Raiders I), 32 Cal.3d 60, 68, 183 Cal. Rptr. 673, 678, 646 P.2d 835 (1982) (at least for "eminent domain purposes, neither the federal nor the state Constitution distinguished between property which is real or personal, tangible or intangible").

Although the certificates of deposit may be characterized as intangible property or contracts, they are "property interests" that are protected under international law from expropriation. For example, in its adjudication of disputes involving claims for compensation for alleged takings of property - bank deposits in Czechoslovakia - the Foreign Claims Settlement Commission observed that whicle "[t]he relationship between a depositor and bank arises only out of contract [,] ... a contract right is property." Panel Opinion No.1, (revised),

Fourteenth Semiannual Report to the Congress for the Period Ending June 30, 1961, 124, 125 (Foreign Cl. Settlement Comm'n)(footnote omitted). The Commission ruled that the "right to payment of [a] deposit is regarded as property" and provides a basis for an expropriation claim. Here, we have citizens who purchased certificates of deposit. Such congracts are properly understood as investments and are therefore ty type of "property" that Hickenlooper sought to protect. Cf. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (some of the factors to be considered in determining whether government action effected a "taking" of property are "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action").

In sum, the rights arising from a certificate of deposit are "rights in property" capable of being expropriated by foreign

states under international law within the meaning of Hickenlooper. We reject the construction suggested by the defendants and hold that "tangibleness" of property is not the dispositive factor.[9] Accordingly, the amendment is applicable and we are free to adjudicate the plaintiffs' claims on the merits.

2. The Merits of the Takings Claim

The plaintiffs claim that the institution of exchange controls by Mexico constituted a taking of property in violation of international law. Determining whether an action by a government is a legitimate exercise of the police power in the regulation of its internal affairs as opposed to a taking of property can pose particularly difficult problems. Valid expropriations must always serve a public purpose; that public purpose in some cases may be so strong as to render lawful what otherwise might constitute a "taking." As one commentator

notes:

> The conclusion that a particular interference is an expropriation might also be avoided if the State whose actions are the subject of complaint had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property ... [For example,] changes in the value of a State's currency ... will ... serve to justify actions which because of their severity would not otherwise be justifiable.

Christie, 38 Brit. Y.B. Int'l L. at 331-2 (footnote omitted).

A state has a strong interest in its monetary policy. Under international law, the legislature generally is free to impose exchange controls. "Customary international law does not normally fetter the municipal legislator's discretion in these matters or characterize his measures as an international wrong." F.A. Mann, The Legal Aspect of Money 465 (4th ed. 1982).[10]

According to the plaintiffs, the Mexican government "eliminated" their dollar accounts and this action combined with the

conversion of those accounts at a specified rate of exchange, violated international law. Plaintiff challenges the following governmental edicts:

> 1. On August 12, 1982, the Mexican Ministry of Treasure and Public Credit issued a decree stating: Bank deposits denominated in foreign currency, made within or outside the Republic to be returned in this [Republic], shall be paid by delivering an equivalent amount in national currency at the rate of exchange prevailing at the place and on the date in which such payment is made. Reglas para el page de depositos bancarios denominados en moneda extranjera, Diaro Official 2, 3 (Aug. 13, 1982) (record translation).
>
> 2. On September 1, 1982, Mexico nationalized its banks because of "the economic crisis from which Mexico is presently suffering ... which in part has been aggravated by the lack of direct control of all of the credit system." Decreto que establece la nacionalizacion de la Banca Privada, D.O. 3 (Sept. 1, 1982) (record translation).
>
> 3. A separate decree issued that day stated that "[u]pon maturity, all bank deposits in foreign currency will be eliminated, and will be repaid at the rate of exchange that on that date has been set by the Banco de Mexico." Decreto que establece el control generalizado de cambios, D.O. at 8 (record translation).

Plaintiffs claim that the institution of these measures effected a confiscation of their dollar accounts.

Actions such as those taken by the Mexican government generally do not constitute takings under international law Professor Mann, a leading expert, has stated the basic rule that "[e]xpectations relating to the continuing intrinsic value of a currency ... suffer from the 'congenital infirmity' that they may be changed by the competent legislator." F.A. Mann, supra, at 474 (quoting Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240, 308 (1935)) (footnote omitted). Moreover, as the New York Court of Appeals noted in French, "[a] currency regulation which alters either the value or character of the money to be paid in satisfaction of contracts is not a 'confiscatio' or 'taking.'" 23 N.Y.2d at 55. We also note that the Director of the Legal Department of the International Monetary

Fund (IMF) has concluded that these exchange controls "do not violate and are not inconsistent with the Article of Agreement of the International Monetary Fund." See Callejo, 764 F.2d at 1119-21 (5th Cir. 1985) (discussing IMF's letter and the extent of deference appropriate to IMF determinations). Mexico's institution of exchange controls was an exercise of its basic authority to regulate its economic affairs.

We cannot conclude that the program of exchange controls instituted by Mexico was unlawful. Mexico's actions as they affected the dollar accounts fall within the rule enunciated by the Restatement (Second) of Foreign Relations Law of the United States §198 (1965). Comment b to this section states:

> [A] requirement that foreign funds held within the territory of the state be surrendered against payment in local currency at the official rate of exchange is not wrongful under international law, even though the local currency is less valuable on the free

market than the foreign funds surrendered.

As the Foreign Claims Settlement Commission observed, "[i]t is a recognized rule of international law that a state has the right to make every effort to stabilize its currency in time of financial stress." In the Matter of Karolin Furst, No. CZ-14, Fourteenth Semiannual Report 116, 117. Here, although the plaintiffs did indeed suffer losses as a result of the institution of exchange controls, these losses were not occasioned by a "taking" of their property as understood by international law. Cf. Panel Opinion NO. 1, at 126 (Foreign Cl. Settlement Comm'n) ("when [a contract right] is lost or injured as a consequence of lawful government action not a taking, the law affords no remedy.")(citiation omitted).

There are, however, some limits to the costs that a state may impose on foreign investors when it institutes exchange controls. International law requires that

aliens not be discriminated against or singled out for regulation by the state. See Christie, 38 Brit. Y.B. Int'l L. at 332. As Professor Mann summarizes, "there comes a point when the exercise of [the state's] discretion so unreasonably or grossly offends against the alien's right to fair and equitable treatment, or so clearly deviates from customary standards of behaviour, that international law will intervene." F.A. Mann, supra at 477. Mexico did not abuse its discretion here.

Finally, plaintiffs advance the claim that the alleged confiscation was violative of international law because they did not receive compensation equivalent to the full market value of their property. We agree with plaintiffs that compensation is ordiarily linked to the legality of a taking. An otherwise valid taking is illegal without the payment of just compensation. This position is articulated in a letter from

Secretary of State Cordell Hull to the Mexican Ambassador in 1940:

> [T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective, and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.

3 Hackworth, Digest of Int'l L. 662 (1942). While there may be exceptions to this principle,[11] generally states have the obligation to make "appropriate" compensation, Restatement, §712, comment c (Tent. Draft No. 7, 1986). See also Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 887-93 (2d Cir. 1981) (discussing the multiple positions in international law on appropriate standards of compensation). Here, however, as we have concluded earlier, there was simply no taking. Thus, no question as to the adequacy of compensation arises.

Even if there had been a taking of plaintiffs' property, we would be reluctant

to adopt the effective result of their position here: a judicially established guarantee of the full repayment of investments abroad in certificates of deposits notwithstanding the actions of foreign governments attempting to control their own economies. The courts of this country should not operate as an international deposit insurance company, hauling foreign sovereigns before us whenever disgruntled investors so desire. West and his fellow plaintiffs chose to purchase both dollar and peso certificates of deposit because of the extraordinary rates of return. The actions of the government of Mexico and the losses they occasioned were within the purview of the risks associated with those potentially extraordinary returns. The judgment of the District Court is

AFFIRMED.

FOOTNOTES

1. David Kennedy, International Legal Structures III-280 (tent. ed. 1984).

2. In light of our disposition, we do not find it necessary to reach the res judicata issues potentially involved here.

3. The "substantiality" requirement has been questioned. See Rosado v. Wyman, 397 U.S. 397, 404 (1970) (calling it "a maxim more ancient than analytically sound").

4. The FSIA exceptions serve to grant article III "arising under" jurisdiction. Verlinden, 461 U.S. 480. Here, both claims fall within such exceptions. Thus, we need not reach the issue whether exch claim must qualify independently under a statutory exception to FSIA or whether if one claim qualifies, jurisdiction exists over related claims as well. Cf. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

5. We also note that the noncompliance of Mexican officials with their own law is certainly not a "commercial activity" within the meaning of the plurality opinion in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-706 (1976). The Dunhill plurality argued that a "commercial activities" exception exists to the act of state doctrine. We do not need to reach that issue here.

6. Accordingly, the district court's ruling that additional discovery was not required to develop these facts in the motion for summary judgment is sustained. While the non-moving party should receive "time for

discovery necessary to develop facts justifying opposition to the motion", Grove v. Mead School District No. 354, 753 F.2d 1528, 1532 (9th Cir.), cert. denied, 106 S.Ct. 85 (1985), the act of state doctrine bars further factual development in this case.

7. Our dictum in Wolf is not to the contrary. There, we stated that "where a foreign government's regulatory structure is implicated, the trial court must hear evidence on the degree of protection that structure offers a depositor against insolvency." 739 F.2d at 1463. We did not intend to imply that a party could challenge the honesty or effectiveness of the foreign officials or introduce evidence seeking to establish that they were not executing their country's laws. Under Clayco, any such challenge is barred. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406-07 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). Of course, a showing can be made either that the structure may not address the depositor's problems or that even with the regulatory system, banks nonetheless fail with some regualarity.

8. Congress's ability to override the act of state doctrine is directly related to the underpinnings of that doctrine. In Sabbatino the Supreme Court explained that the act of state doctrine was grounded largely upon "the competence and function of the Judiciary ... in ordering our relationships with other members of the international community." 376 U.S. at 425. In addition to concerns of institutional competence, the Court indicated that the "absence of a treaty or other unambiguous agreement regarding controlling legal principles" gave it pause. Id. at 428. In the context of expropriation claims, Congress

has determined both that the courts are competent to resolve such claims (unless the President specifically directs otherwise in a particular case, 22 U.S.C. §2370 (e)(2) and that the relevant content of international law is clear.

9. We do not intend to suggest by our discussions in the text that every contract claim is encompassed by the protections of Hickenlooper.

10. Throughout the proceedings the parties have treated international law as applicable. We believe their choice of law is correct. It is appropriate to look to international law when determining whether the institution of exchange control regulations constitutes a "taking" for purposes of FSIA. We note, however, that in ascertaining the content of international law, we may look to various sources of law, including United States law.

11. For example, many scholars have argued that this requirement does not apply when a state expropriates agricultural land for purposes of redistributive reform, see, e.g., 1 Oppenheim, International Law 352, (8th ed. Lauterpacht 1955). Cf. Asociacian de Reclamantes v. United Mexican States, 561 F. Supp. 1190, 1198 (D.D.C. 1983) (ruling that court did not have jurisdiction under 28 U.S.C. §1605(a)(5) because the "highest authorities" of government failed to compensate plaintiffs for land grant claims and such claims "raise substantial and serious questions of fiscal policy, and the allocation of limited resources.") (footnote omitted), aff'd on other grounds, 735 F.2d 1517 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 1751 (1985).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACK WEST, et al., Plaintiffs, vs. MULTIBANCO COMERMEX, S.A., Defendant.	C 83 0174 WWS
PHILIP B. THOMPSON, et al., Plaintiffs, vs. BANCOMER, S.N.C., Defendant.	C 83 0155 WWS
GEORGE M. DAVIES, et al., Plaintiffs, vs. BANCO NACIONAL DE MEXICO, S.A., Defendant.	C 82 6978 WWS

ORDER, May 23, 1985

Before: WILLIAM W SCHWARZER,
District Judge

These actions are before the Court on defendants' motions to dismiss. Because those motions are supported by declarations, they will be treated as motions for summary judgment.

Plaintiffs' amended complaints appear to assert two claims. The first is based on alleged violations of the federal securities laws. Defendants' declarations establish that they are subject to the same regulation by the Mexican government as was the defendant in Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (9th Cir. 1984). Plaintiffs argue that the regulatory scheme is not effective but do not dispute the declarations. The Wolf decision therefore controls and the certificates of deposit cannot be treated as securities subject to the federal acts.

The second claim is based on an alleged unlawful taking. That claim is barred by the Act of State doctrine. Braka v. Ban-

comer, S.N.C., No. 84-7626, slip op. (2d Cir. May 20, 1985).

Accordingly, the motions are granted and the Complaints dismissed, the parties to bear their own costs.

IT IS SO ORDERED.

DATED: May 23, 1985

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK WEST, et al., Plaintiffs-Appellants, vs. MULTIBANCO COMERMEX, S.A., Defendant-Appellee.	NO. 85-2162
PHILIP B. THOMPSON, et al., Plaintiffs-Appellants, vs. BANCOMER, S.N.C., Defendant-Appellee.	NO. 85-2163
GEORGE M. DAVIES, et al., Plaintiffs-Appellants, vs. BANCO NACIONAL DE MEXICO, S.A., Defendant-Appellee.	NO. 85-2164

ORDER, March 10, 1987

Before: GOODWIN, HUG and REINHARDT
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. app. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The Securities Act of 1933, 15 U.S.C. §77 b provides:

When used in this subchapter, unless the context otherwise requires -
(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. §77 e provides:

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly -
(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. §77 l provides:

Any person who -
(1) offers or sells a security in violation of section 77 e of this title, or
(2) offers or sells a security (whether or not exempted by the provisions of section 77 c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which

includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

The Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611, provides as follows:

§1602. The congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§1603. For purposes of this chapter -
(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) An "agency or instrumentality of a

foreign state" means any entity -
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or policital subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§1604. Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§1605. (a) A foreign state shall not be immune from the jurisdiction of courts of the United States in any case -

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue

and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; ***

1606. As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; ***

The Foreign Assistance Act at 22 U.S.C. §2370(e)(1) provides:

The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962 -

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen or any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the

effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,

and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and the provisions of this subsection shall not be waived with respect to any country unless the President determines and certifies that such a waiver is important to the national interests of

the United States. Such certification shall be reported immediately to Congress. ***

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the prinicples of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application

of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

No. 86-1648

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON, GEORGE M. DAVIES, et al.,

Petitioners,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C., and BANCO NACIONAL DE MEXICO, S.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certificates of deposit issued to petitioners in the ordinary course of banking business by established, well-regulated, *bona fide* Mexican banks are securities under the federal securities laws?

2. Whether the enactment of non-discriminatory currency exchange controls by the Mexican government constituted a "taking" and whether the alleged taking was in violation of international law?

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RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *Facts*

Petitioners allegedly made peso-denominated and dollar-denominated deposits with the respondent banks in Mexico prior to August 12, 1982 and were issued certificates of deposit payable in Mexico. Respondents are banks organized under the laws of Mexico. Like all other private Mexican banks, respondents were nationalized pursuant to a decree promulgated by the Government of Mexico on September 1, 1982.[1]

[1] *Statement Pursuant to Supreme Court Rule 28.1.* The Government of the United Mexican States is the majority owner of Respondents Multibanco Comermex, S.A., Bancomer, S.N.C. and Banco Nacional de Mexico, S.A., which are nationalized instrumentalities of the Mexican government.

Prior to nationalization, and continuing through the present, the respondent banks were extensively supervised and regulated by the Mexican government and its agencies. Respondents were supervised by the Banco de Mexico (the Mexican Central Bank), the National Banking and Insurance Commission, and the Ministry of Finance and Public Credit. Respondents were required to adhere to strict financial and disclosure requirements, including paid-in capital and reserve requirements, and were required to publish monthly financial statements which were submitted for approval by the National Banking and Insurance Commission. That Commission also audited the banks annually. Respondents were also required to submit their advertising to the National Banking and Insurance Commission for prior approval. In the event of a bank failure, deposits, including the time deposit accounts at issue here, constituted preferential claims against various other obligations. Indeed, as found by the Ninth Circuit Court of Appeals in *Wolf v. Banco Nacional de Mexico*, 739 F.2d 1458, 1463 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985), no Mexican bank had failed in the last fifty years.

Petitioners made their deposits in Mexico. Each petitioner admits that he dealt with a branch of a respondent bank located in Mexico, that his funds were accepted in Mexico, and that the deposits were maintained there. Petitioners' funds, having been placed in Mexico, thus became subject to Mexican law, including exchange control regulations.

Interest and principal on the deposits were credited and paid in Mexico. Respondent Bancomer's policy would allow it to issue certificates of deposit only in Mexico and only after receipt of funds in Mexico. In addition, Bancomer maintained and paid deposits only in Mexico. Respondent Multibanco Comermex had no branch in the United States to accept, maintain or pay deposits and Multibanco Comermex's policy, therefore, required that certificates of deposit be accepted, deposited and paid only in Mexico. The certificate of deposit form used by respondent Banamex even specified a choice of Mexican law and tribunals. In short, the transactions in issue were entirely Mexican.

It is undisputed that petitioners received full and complete payment of all amounts due on their peso-denominated certificates of deposit. With respect to these certificates petitioners merely claim that the pesos received were less valuable, as against the dollar, than they had hoped, due (they also claim) to the depreciation in value of the peso as a result of the decision of the Banco de Mexico to cease its intervention in the Mexican money market.

The respondent banks' obligations under dollar-denominated certificates of deposit were directly affected by governmental action on August 12, 1982, when the Mexican Government enacted currency exchange regulations preventing them from making payment in dollars to holders of such certificates. The regulations required all Mexican banks to tender payment under certificates of deposit at their maturity in pesos at a rate of exchange fixed by law. At the time of the August decree, each of the respondent banks was privately owned. The decree applied to all Mexican banks, whether privately or publicly owned, and to all deposits denominated in foreign currency, whether the deposits were owned by Mexicans or foreigners. No discriminatory action was aimed at foreigners.

On September 1, 1982 the Government of Mexico extended and clarified its exchange control regime, and specified the Banco de Mexico as the institution that would set the applicable exchange rate for the conversion of the deposits from dollars to pesos. As in the case of the August decree, the new decree applied to all banking institutions and to all deposits in Mexico. The decree was not specially directed at foreign depositors and they received no different treatment than did Mexican depositors.

In compliance with the currency exchange regulations set forth above, petitioners who held dollar-denominated certificates were paid the full amount of both principal and interest on their deposits at maturity in pesos at the specified exchange rate, which they accepted.

It is undisputed that the actions of Mexico were taken in response to a severe economic crisis that threatened to exhaust Mexico's scarce foreign currency reserves. The provisions relating to deposits were only a small part of a comprehensive plan involving import controls, international debt restructuring and exchange controls. Moreover, the exchange control system was first put into place in August 1982, at a time when each of the respondent banks was privately owned. At no time did any of the petitioners have a contractual relationship with the Government of Mexico. Moreover, the acts of Mexico in question consisted of comprehensive legislation, national in scope, aimed not at individual contractual situations but applicable with the force of law to nationals and foreigners alike.

B. *Proceedings Below*

Petitioners brought suit in the United States District Court for the Northern District of California against the respondent banks alleging that the certificates of deposit sold by the respondents were "securities" sold in violation of the Securities Act of 1933. Petitioners also alleged that respondents had engaged in a "taking" in violation of international law by repaying petitioners' certificates of deposit in accordance with the exchange control regulations enacted by the Mexican government.

Petitioners contend that the bases for jurisdiction in the district court were the Securities Act of 1933, 15 U.S.C. §77 *l* (1),(2) and v, and the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §1602 *et seq*. However, respondents believe, and argued below, that the FSIA does not provide a basis for subject matter jurisdiction and the federal securities laws cannot provide a basis for jurisdiction independent of the FSIA.

In the district court the respondent banks moved to dismiss the actions pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Respondents argued that the certificates of deposit in question were not "securities" as defined by the federal securities laws, that all of petitioners' claims were barred by the Act of State Doctrine, and that the district court lacked both

personal and subject matter jurisdiction over respondents which, as nationalized instrumentalities of the Mexican government, are entitled to sovereign immunity under the FSIA.

Because the motion was accompanied by affidavits and other supporting documents, the district court considered the motion as one for summary judgment. The district court granted summary judgment to the respondent banks, and dismissed petitioners' claims. The district court applied the decision of the Ninth Circuit Court of Appeals in *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (1984), *cert. denied*, 469 U.S. 1108 (1985), holding that the certificates of deposit were not "securities". The district court also held that the Act of State Doctrine barred the "taking" claims. It did not rule on the issue of jurisdiction under the FSIA. Petitioners' Appendix at 47-49.

The Ninth Circuit Court of Appeals, while holding that the district court did have jurisdiction consistent with the FSIA, affirmed the judgment of the district court dismissing the actions. The Court of Appeals applied its own decision in *Wolf*, *supra*, and held that the certificates of deposit in question were not securities. It further held that there had been no "taking" of petitioners' property in violation of international law. Petitioners' Appendix at 1-46.

SUMMARY OF ARGUMENT

Not only was the Ninth Circuit Court of Appeals' affirmance of the dismissal of petitioners' claims correct, but petitioners have shown no "special and important" reasons for this Court to review on writ of certioriari the decision of the Court of Appeals. Supreme Court Rule 17. There is no conflict between the decisions of the Ninth Circuit and the decisions of this Court or of other Courts of Appeal. Nor have petitioners raised any important question of federal law that needs to be decided by this Court or any other reason justifying grant of the writ.

The holding of the Court of Appeals that the certificates of deposit purchased by petitioners were not "securities" under the federal securities laws was consistent with the decisions of all

three Courts of Appeal that have decided the question, and represented a proper application of this Court's decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982). Petitioners have sought to evade these facts by disingenuously failing to inform this Court of any of the prior consistent decisions of the Courts of Appeals, and by seeking to distinguish this case from *Marine Bank*. However, petitioners attempts to distinguish this case are completely without merit and in raising these purported distinctions petitioners are inappropriately asking the Supreme Court to undertake a fact finding task already undertaken below. Nor do any of the other arguments of the Petition on this point possess merit or warrant this Court's review of the matter. Petitioners attempted reliance on the International Banking Act of 1978, for example, is indicative of the baselessness of their position, as that Act has absolutely no application to the facts of this case.

Similarly, petitioners have offered no reason why this Court should review the Court of Appeals holding that there had been no "taking" in violation of international law. That holding, like the Court's holding on the securities law issue, was consistent with settled law. Furthermore, it rested on two bases — that there had been (1) no "taking" and (2) no violation of international law — either one of which is dispositive, and both of which were clearly correct. Nor does the Court of Appeal's decision on the "taking" claim present an important question requiring resolution by this Court. Far from asking the courts to enforce clear principles of international law, the Petition improperly demands domestic judicial intervention into areas in which sovereign prerogatives are well established and seeks to have the courts of this country sit in judgment on Mexico's chosen means and policies for confronting its economic crisis.[2]

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[2] There are also additional grounds, argued below by respondents but rejected in whole or in part by the Court of Appeals, which support the dismissal of petitioners' actions. First, because adjudication of petitioners' claims would require a United States court to pass directly upon the validity and extent of a sovereign act of the Government of Mexico, *i.e.*, the imposition of exchange control regulations, the Act of State Doctrine requires dismissal of

(Footnote Continued)

ARGUMENT

I

THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE MEXICAN BANK CERTIFICATES OF DEPOSIT ARE NOT SECURITIES UNDER THE FEDERAL SECURITIES LAWS

A. *The Securities Issue Is Not Worthy Of This Court's Review.*

The Court below concluded that ". . . the certificates of deposit issued by Mexican banks are not 'securities' . . . . Since the certificates were not subject to the requirements of U.S. securities law, the [petitioners] cannot prevail on their securities law claim." Petitioners' Appendix at 28. The Court's conclusion is correct, and fully consistent with prior decisions of this Court, all circuit court decisions that have addressed the same issue, and the statutory framework embodied by the federal securities laws. Accordingly, review by the Supreme Court is neither warranted nor compelled by the circumstances of this case.

Nevertheless, petitioners suggest that the Ninth Circuit's conclusion either is inconsistent with prior precedent or represented essentially a matter of first impression before the Court below. It is neither. What petitioners fail to disclose is that their position has been unanimously rejected, and the conclusion of the Court below specifically reached, in each of three prior circuit

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(Footnote Continued)
all of petitioners' claims. The Hickenlooper Amendment, 22 U.S.C. §2370(e)(2), does not bar application of the Act of State Doctrine as the Amendment applies only to "takings" of tangible property and not intangible contract rights. In addition, the district court lacked both personal and subject matter jurisdiction over respondents, who are nationalized instrumentalities of the Mexican government entitled to soverign immunity under the FSIA, as no exception to the general rule of immunity applies under the FSIA in these cases. The existence of these alternative grounds for dismissal further demonstrates the lack of need for and the futility of granting certiorari herein.

court decisions which have addressed this issue – by the Ninth Circuit in *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); by the Fifth Circuit in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); and by the Sixth Circuit in *Riedel v. Bancam, S.A.*, 792 F.2d 587 (6th Cir. 1986).[3] Not one of those circuit court decisions is cited in petitioners' twelve-page argument devoted to the securities issue. Petition at 4-15. Petitioners would have the Supreme Court ignore the unanimous, consistent body of circuit decisions that has developed from this Court's decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982). What petitioners seek is not consistency with precedent, but instead a rejection of the clear and unanimous precedent that the Mexican bank certificates of deposit at issue are not securities under the federal securities laws.

B. *The Result Below Is Identical To The Results Reached In All Prior Decisions That Have Addressed The Issue.*

In reaching its conclusion that the securities claims of petitioners must be dismissed because the certificates of deposit at issue were not securities under the federal securities laws, the Court below followed the 1984 Ninth Circuit decision in *Wolf v. Banco Nacional de Mexico, S.A. supra*. In *Wolf*, the Ninth Circuit held that certificates of deposit issued by Mexican banks are not "securities." Significantly, the *Wolf* decision, which this Court refused to hear on writ of certiorari, has been followed by every court that has subsequently considered the same issue. In *Callejo v. Bancomer, S.A., supra*, the Fifth Circuit held "that purchasers of certificates of deposit issued by Mexican banks are adequately protected by Mexican banking law and consequently do not require the protections afforded by federal securities laws." 764 F.2d at 1125 n. 33. Likewise, in *Riedel*

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[3] In a fourth decision (from the Second Circuit), *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985), the same result was reached (to wit, dismissal of the plaintiff's securities law claim), although the Court relied only upon the Act of State Doctrine in reaching that conclusion.

v. Bancam, S.A., supra, the district court conclusion that the Mexican bank certificates of deposit were not "securities" under the federal securities law went unchallenged before the Sixth Circuit, thus resulting in a dismissal of plaintiff's federal securities law claims.

Thus, the result reached below is fully consistent with the only other circuit court decisions that have addressed the same issue. The circuits are in agreement. The law is clear. Supreme Court review is unnecessary.

C. *The Decision Below Is Consistent With, And Correctly Applies, The Test Enunciated In This Court's Decision In Marine Bank v. Weaver.*

As with the *Wolf*, *Callejo* and *Riedel* cases, the decision below was based upon an application of the test enunciated by the Supreme Court in *Marine Bank v. Weaver*, *supra*. In *Weaver*, the Supreme Court held that certificates of deposit issued by United States banks are not securities, reasoning that domestic banks are so heavily regulated under the federal banking laws that their depositors are "abundantly protected" against the risk that a bank will become insolvent. 455 U.S. at 559. Applying the *Weaver* "regulatory protection" test, the Fifth, Sixth, and Ninth Circuits have unanimously held that Mexican bank certificates of deposit are not securities. These decisions represent a logical application of the *Weaver* test to foreign bank time deposit accounts. Such an application protects U.S. depositors in those accounts to the same or similar extent depositors in U.S. bank accounts are protected, is consistent with the history and purpose of the federal securities laws, requires no unseemly discrimination against or lack of respect for neighboring and friendly countries and involves no intrusion upon acts of a foreign state.

And yet, petitioners claim that distinctions exist between this case and *Weaver* requiring application of a different legal standard. Petitioners are mistaken.[4]

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[4] Not only are petitioners mistaken in their analysis, but in raising the supposed "distinctions" in the first place are inappropriately asking the Supreme

(Footnote Continued)

For example, petitioners note that certificates of deposit issued by the Mexican banks were not insured by the FDIC. Petition at 12. Such a "distinction" is one without a difference. Petitioners ignore the fact that it is the overall effect of government regulations and not their particular terms or source which removes the risks that the securities laws were designed to protect against. The existence of FDIC insurance was only one of the factors considered by the Supreme Court in *Weaver*.[5] The decision in *Weaver* nowhere suggests that, notwithstanding all the other federal regulations which govern domestic banking operations, the FDIC's insurance limits provide the only guarantee against insolvency.[6]

(Footnote Continued)
Court to undertake essentially a fact-finding task that has already been performed by courts below (resulting in conclusions contrary to petitioners' position). *See Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d at 1463 (where the Ninth Circuit found that the Mexican banking regulatory scheme is just as comprehensive as, and in many areas more protective than, the United States federal system); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1125 n. 33. Such fact finding is certainly not one worthy of this Court's review and expenditure of precious time.

[5] If deposit insurance had been a prerequisite for finding repayment of the certificate of deposit to be "virtually guaranteed" in *Weaver*, then, following petitioners' analysis, a certificate of deposit for $100,000 issued by a domestic bank would not be a security because the deposit is fully insured, whereas a certificate of deposit for $2,000,000 issued by the same bank would be a security because only five percent of that deposit would be insured. *See* 12 U.S.C. §1821(a)(1). FDIC insurance currently insures a depositor up to a maximum of $100,000 on each deposit. Thus, a deposit of $100,000 or under is fully insured against the bank's insolvency, while a $2,000,000 deposit would be protected only up to five percent of that amount. This Court did not concern itself about this point in *Weaver*, even though at the time that suit was brought therein only 80 percent of the deposit at issue was subject to FDIC insurance.

[6] Mexico has the same policy, and has been just as – if not more – effective in implementing that policy. Indeed, the comprehensive regulation and oversight of Mexico's banking industry has historically provided greater protection against bank failure than FDIC insurance has provided in the United States. Although no Mexican bank has become insolvent in 50 years (*Wolf*

(Footnote Continued)

Petitioners also attempt to distinguish *Weaver* because it did not consider the risk created by foreign currency exchange controls and devaluation. Petition at 13. But petitioners ignore the fact that "federal regulations and deposit insurance that were so important to the Court in *Weaver* would not in any way have protected [a] . . . depositor from losses caused by the devaluation." *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d at 1462. Internal and external economic risks – such as inflation, currency fluctuations or governmental intervention – have never been considered by this Court as appropriate criteria for determining whether an instrument is a "security". Such risks are inherent in all transactions. Thus, the Court in *Weaver* did not inquire whether each dollar to be received by the Weavers in 1984 would be less valuable – due to inflation, devaluation, or otherwise – than each dollar they deposited in 1978.[7] Such risks were wholly outside the control of Marine Bank and their consideration would have done nothing to advance the Court's contextual, definitional analysis.

In sum, the effort of petitioners to distinguish *Weaver* from the present consolidated cases only highlights the compelling reasons for application of the *Weaver* "regulatory protection" test to foreign bank time deposit accounts. Both the specific holding and contextual analysis of *Weaver* support the Ninth Circuit's conclusion below (and the similar conclusions reached in *Wolf*, *Callejo* and *Riedel*).

(Footnote Continued)

v. Banco Nacional de Mexico, S.A., 739 F.2d at 1463), by contrast, 722 United States banks failed in the period from 1934 to 1981, 136 of which were not insured by the FDIC. *See* 1981 Annual Report, Federal Deposit Insurance Corporation, Vol. I, p. 70. Petitioners themselves admitted below (Appellants' Brief at 14) that the regulation of banks in the United States has not always been perfect, as is evidenced by 76 recent bank failures. Nevertheless, even petitioners must agree that certificates of deposit issued by those banks cannot be securities under *Weaver*.

[7] While the effect of devaluation on this Court's analysis in *Weaver* must rest on hypothetical examples, the effect of inflation can be calculated exactly.

(Footnote Continued)

D. *Petitioners Ask The Court To Disregard Or Overrule Its Prior Decisions (Including Its Decision In Marine Bank v. Weaver) And The Consistent, Unanimous Line Of Circuit Court Authority Applying Those Decisions To The Facts Of This Case.*

Having ignored three prior circuit court decisions that have addressed the same issue and resolved it against them, and having misread this Court's decision in *Marine Bank v. Weaver*, petitioners present additional random arguments that either have been expressly rejected by this Court and other courts or are contrary to the teachings of this Court's prior decisions. Each such argument is without merit.

(1) Petitioners urge this Court to forego a contextual analysis of the case and look instead to the "plain language and obvious purposes of the Securities Act of 1933." Petition at 4. Petitioners' argument is flawed in at least two respects.

First, this Court has long ago laid to rest a literal approach to interpretation of the federal securities laws. For example, in *Weaver*, the Court reaffirmed that the test for determining whether an instrument is a security " 'is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.' " 455 U.S. at 556 (quoting from *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967)). Moreover, even in applying the literal approach, this Court made it clear in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), while referring to *Weaver*, that a certificate of

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(Footnote Continued)

The six-year certificate of deposit in *Weaver* was issued in 1978 and paid interest at the rate of 7 1/2% per annum. Inflation averaged 10.9% per annum from 1978 through 1981 (Economic Report of the President, February, 1983, at 225), so that the value of the Weavers' deposit actually diminished during that period, even after interest is taken into account. This Court never suggested in *Weaver* that the absence of federal regulations protecting against the impact of inflation was material to the securities status of the certificate of deposit in issue.

deposit "did not fit squarely within one of the enumerated specific kinds of securities listed in the [statutory] definition." *Id.* at 689 n. 4.

Second, this Court has made it abundantly clear on numerous occasions that "generalized references to the 'remedial purposes'" of the securities laws "will not justify reading a provision 'more broadly than its language and statutory scheme reasonably permit.'" *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). *See also Aaron v. S.E.C.*, 446 U.S. 680, 695 (1980); *S.E.C. v. Sloan*, 436 U.S. 103, 116 (1978). Thus, petitioners' sweeping references to the "obvious purposes" of the federal securities laws will not overcome the existence of unanimous authority contrary to their position.

(2) Petitioners argue that the subject certificates of deposit should be evaluated by a test for defining a security other than the test applied in *Weaver*, *Wolf*, *Callejo*, and *Riedel*. This identical argument was properly rejected in *Wolf*: "[W]hen the Supreme Court, in *Marine Bank v. Weaver*, has so recently applied the definition [of security] to facts very similar to those in the case before us, we are bound by its reasoning there, to the exclusion of criteria articulated in other contexts." 739 F.2d at 1461.

Nevertheless, petitioners assert that since defendant Mexican banks allegedly advertised in U.S. markets and described their accounts as "investments," some different, never-before-used test should be applied here. But under this Court's prior decisions, neither factor is determinative or even material to the definitional analysis.[8] Clearly, not all "investments" are

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[8] Contrary to petitioners' argument, the pre-*Weaver* Supreme Court cases did not hold that "any instrument . . . when offered to the general public as an attractive investment and not specifically exempt, is a security for purposes of the federal securities laws." Petition at 15. Rather, the "touchstone" of those decisions (including *S.E.C. v. W. J. Howey Co.*, 328 U.S. 293 (1946) and its progeny) has been "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *United Housing Foundation,*

(Footnote Continued)

securities. An insurance policy, for example, may be advertised and sold as a good "investment," but it is still not a "security" for purposes of the federal securities laws. Numerous decisions by this Court and, in particular, *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 850 (1975), hold that the label given to an instrument is not dispositive. Moreover, even assuming advertising or solicitation of the magnitude that petitioners claim, such activities were no greater than the widespread advertisements of domestic banks offering time deposit accounts at competitive rates of interest. Petitioners would convert customary banking, deposit transactions into the sale of a security simply because of allegations of advertising. However, even in the face of allegations of direct, fraudulent solicitations by bank employees in *Weaver*, 455 U.S. at 553 (*see* lower court opinion in *Weaver v. Marine Bank*, 637 F.2d 157, 160 (3rd Cir. 1980)), this Court refused to hold the certificate of deposit to be a security. It is inconceivable that the result in *Weaver* would have been different if the plaintiffs therein had alleged or proved that the bank engaged in widespread advertising – as Marine Bank undoubtedly did – to obtain deposits.

(3) Petitioners contend that blind deference should be given to the "position of the Securities and Exchange Commission that certificates of deposit and similar instruments issued by banking organizations that are not subject to domestic bank regulation are securities." Petition at 9. Again, petitioners' presentation on this "issue" is incomplete, misleading, and flawed.

First, all of the purported "support" for petitioners' position is conspicuously pre-*Weaver* and, perhaps more significantly,

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(Footnote Continued)
Inc. v. Forman, 421 U.S. 837, 852 (1975). The certificates of deposit issued by the banks herein obviously do not involve an investment of money in a common enterprise with the expectation of profits resulting from the managerial efforts of others. Indeed, prior to *Weaver*, the courts in *Canadian Imperial Bank of Commerce v. Fingland*, 615 F.2d 465, 469-70 (7th Cir. 1980) and *Hendrickson v. Buchbinder*, 465 F.Supp. 1250, 1252 (S.D.Fla. 1979), relied upon *Howey* and concluded that accounts in foreign banks similar to those involved here were not securities.

inconsistent with the result that has been reached in all three circuit courts that have addressed the issue. Second, petitioners ignore the fact that the FDIC, another governmental agency whose views are entitled to deference, argued as an *amicus* party in *Wolf* against the position taken by the S.E.C. Indeed, the common position advocated by the Mexican bank (Banco Nacional de Mexico, S.A.) and the FDIC was adopted by the Ninth Circuit in *Wolf*. Third, while deference may on occasion be shown by the Supreme Court to the S.E.C. or other governmental agencies, that deference is not dispositive, as suggested by petitioners. Indeed, in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20 (1979), the Court refused to follow the S.E.C.'s view on the securities issue and noted that on "a number of occasions in recent years this Court has found it necessary to reject the S.E.C.'s interpretation of various provisions of the Securities Acts."

(4) Finally, petitioners contend that the Mexican banks violated the spirit, if not the letter, of the International Banking Act of 1978 (12 U.S.C. §3101, *et seq.*) ("IBA"). Petition at 16-17. The IBA governs the ability of foreign banks to establish and operate branches or agencies in the United States. 12 U.S.C. §§3101, 3102. In the present consolidated cases, it is undisputed that the certificates of deposit issued by the defendant banks were not issued by branches or agencies in the United States. As a result, the IBA has no application to petitioners' claims under the federal securities laws.[9]

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[9] Moreover, in the IBA, Congress recognized that the U.S. banking system does not operate in a vacuum, unaffected by international banking, isolated from banks in other parts of the world. The legislative history reveals an intent to encourage "free and open international banking." S. Rep. No. 1073, 95th Cong., 2d Sess. 18 (1978). At a minimum, the position advanced by petitioners would, if approved by this Court, disrupt the "free and open international banking" envisioned by Congress and would result in invidious discrimination against foreign banks not in keeping with the legislative mandate in the IBA or the judicial mandate of *Weaver*.

II

NO SPECIAL AND IMPORTANT REASONS REQUIRE REVIEW OF THE NINTH CIRCUIT'S DECISION REGARDING THE "TAKING" CLAIM

There exist no "special and important reasons" for review on writ of certiorari of the Ninth Circuit's decision on the "taking" claim. Supreme Court Rule 17. No conflict exists with decisions of this Court or of other circuit courts. To the contrary, the decision below is consistent with decisions of courts in identical and similar cases, and with recognized principles of international law. Nor does the decision on the "taking" claim present an important question that requires resolution by this Court. Thus, the petition for a writ of certiorari should be denied.

A. *The Court Of Appeals Holding That No "Taking" Had Occurred Is Consistent With Settled Law And Presents No Conflict With Decisions Of This Court Or The Other Courts Of Appeal*

Petitioners who had made deposits denominated in dollars claim that, by adhering to the regulatory scheme adopted by the Mexican Government, the respondent banks engaged in a "taking" of property in violation of international law.[10] The

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[10] By basing their claims upon allegations of a taking in violation of international law, instead of breach of contract, petitioners sought to avoid the body of law established by the unanimous holdings of the other Circuit Courts that such contract claims must be dismissed under the Act of State Doctrine. *See, e.g., Riedel v. Bancam, S.A.*, 792 F.2d 587 (6th Cir. 1986); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985); *Sanger v. Bancomer*, No. 84-1223 (S.D.N.Y. Sept. 7, 1984); *Braka v. Multibanco Comermex, S.A.*, 589 F.Supp. 802 (S.D.N.Y. 1984); *Braka v. Nacional Financiera, S.A.*, No. 83-4161 (S.D.N.Y. July 9, 1984); *Frankel v. Banco Nacional de Mexico, S.A.*, No. 82-6457 (S.D.N.Y. May 31, 1983), *appeal dismissed*, No. 83-7543 (2d Cir. July 12, 1983); *Offshore Express, Inc. v. Multibanco Comermex, S.A.*, New York Law Journal, July 7, 1983, at 6, col. 1 (N.Y. Sup. Ct.). However, the courts have steadfastly refused to allow litigants to convert what are essentially breach

(Footnote Continued)

Ninth Circuit held that a "taking" had not occurred, as that term is understood in international law, Petitioners' Appendix at 40, 42, and that the Mexican Government's exchange controls did not in any way constitute a violation of international law. In so doing, the Ninth Circuit merely applied settled law, found in the decisions of this Court and the lower courts and in the commentaries of recognized international authorities, that a sovereign nation has considerable latitude under international law in fixing its monetary policy and enacting a currency control regime, without such measures resulting in a compensable "taking".

The cases and commentators agree with the Ninth Circuit that a "taking" has not occurred when a state enacts nondiscriminatory monetary legislation of general application in the exercise of its basic authority to regulate its internal economic affairs, even though as a consequence thereof losses may result to particular persons. The most succinct exposition of this principle is found in *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 55, 295 N.Y.S.2d 433, 442, 242 N.E.2d 704, 710 (1968):

> A currency regulation which alters either the value or character of the money to be paid in satisfaction of contracts is not a "confiscation" or "taking."

(Footnote Continued)
of contract claims into claims of "confiscation or other taking." *Menendez v. Saks*, 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Friedar v. Government of Israel*, 614 F.Supp. 395, 399 (S.D.N.Y. 1985); *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F.Supp. 1337, 1346-47 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984); *Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co.*, 396 F.Supp. 461, 472 (W.D. La. 1975), *rev'd on other grounds sub nom., Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 59, 242 N.E.2d 704, 713, 295 N.Y.S.2d 433, 446 (1968).

Accord Braka v. Bancomer, S.A., 589 F.Supp. 1465, 1472-73 (S.D.N.Y. 1984) (Sofaer, J.), *aff'd*, 762 F.2d 222 (2d Cir. 1985). Dr. F.A. Mann, the leading authority on international monetary law, is in agreement:

> A legislator who reduces rates of interest or renders agreements invalid or incapable of being performed, or prohibits exports, or renders performance more expensive by the imposition of taxes or tariffs does not take property. Nor does he take property if he depreciates currency, or prohibits payment in foreign currency, or abrogates gold clauses. Expectations relating to the continuing intrinsic value of a currency, or of contractual terms such as the gold clause are, like favorable business conditions and goodwill, 'transient circumstances, subject to changes', and suffer from the 'congenital infirmity' that they may be changed by the competent legislator. They are not property, their change is not deprivation.

F.A. Mann, *The Legal Aspect of Money* 474 (4th ed. 1982) (footnotes omitted). *See also* 8 M. Whiteman, *Digest of International Law* 980-92 (1967) (collecting authorities for the same principle).

In a context where, unlike international law, the rigorous requirements of the United States Constitution must be satisfied, a long line of case law has held that property was not "taken", as that term is used in the Fifth Amendment, by the enactment of legal tender and currency legislation by the United States. In the Legal Tender Cases, this Court considered whether acts of Congress which made treasury notes legal tender for the payment of all debts were constitutional to the extent that the acts applied to existing obligations. In *Knox v. Lee*, 79 U.S. 457, 549-50 (1871), this Court stated that:

> Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. . . .

> Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless . . . It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts.

With respect to the Fifth Amendment's proscriptions against uncompensated "takings" of private property, the Court in *Knox* held that the Fifth Amendment

> has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.

Id. at 551.

The same conclusion was reached in the Gold Clause Cases, which arose out of the Joint Resolution which nullified "gold clause" stipulations in money obligations. In *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 305 (1935), this Court rejected a Fifth Amendment challenge to the legislation, noting that

> contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government and that no obligation of a contract "can extend to the defeat" of that authority.

It is clear, therefore, under United States law that government regulations regarding the methods and means of payment under existing contracts are not considered "takings" giving rise to a right to compensation. This principle applies *a fortiori*

where the country enacting such regulations is a foreign nation, as the cases and commentators cited above have found. Surely, petitioners can derive no greater rights against a foreign government than they would have against their own government.[11]

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[11] Petitioners refer to two decisions of this Court and one decision of the Court of Appeals for the Second Circuit in an attempt to demonstrate conflict with the Ninth Circuit's decision in the instant case. None of those decisions has any bearing on the issues presented in this case. *McDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986), involved whether certain zoning regulations amounted to a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution. The case had nothing to do with currency regulations, either in the United States or elsewhere. *U.S. v. General Motors*, 323 U.S. 373 (1945), involved condemnation of a lease under the War Powers Act and had nothing to do with exchange control regulations or international law. In *Allied Bank v. Banco Credito Agricola*, 757 F.2d 516 (2d Cir.), *cert. denied*, 106 S.Ct. 30 (1985), the Government of Costa Rica totally barred repayment of dollar obligations of Costa Rican banks that were due and payable in New York and to which the laws of New York were made applicable. The Second Circuit ruled that the Act of State Doctrine did not preclude a breach of contract action because the situs of the debt was in the United States. By contrast, in the instant case the situs of the debt was clearly Mexico, where the deposits were maintained. In *dictum*, the Second Circuit stated in a footnote that the Government action constituted a "taking". 757 F.2d at 521 n.3. The Costa Rican decrees, however, totally barred payment and extinguished the obligation. *Cf.* Panel Opinion No. 1 (Revised), Fourteenth Semiannual Report 124, 126 (Foreign Claims Settlement Commission) (blocking of account is not a taking; total annulment of account without any payment is a taking). The Mexican provisions at issue here did not fully extinguish the obligation, but merely altered the currency in which the obligation would be satisfied. Petitioners in this case received and accepted the full amount of pesos to which they were entitled pursuant to the exchange control decrees.

B. *The Court Of Appeals Holding That There Was No Violation Of International Law Was Consistent With General Principles Of International Law And The Decisions Of Other Courts*

The existence of an alternative ground for dismissal of the petitioners' claim of "taking" provides yet another reason that the Petition should not be granted. Even if a "taking" were involved in this case, it is clear that the taking was not "in violation of international law." Once again, that conclusion has wide support in case law and distinguished commentary.

Section 198 of the Restatement (Second) of Foreign Relations (1965) states unequivocally that a foreign nation does not violate international law when it enacts regulations "reasonably necessary in order to control the value of currency or to protect the foreign exchange resources of the state."[12]

Several courts in addition to the Ninth Circuit have found that the same Mexican exchange controls at issue here do not violate international law. *Callejo v. Bancomer, S.A.*, 764 F.2d 1110, 1117 n.21; *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1472-73 (S.D.N.Y. 1974) (Sofaer, J.), *aff'd*, 762 F.2d 222 (2d Cir. 1985) ("the legality of such foreign exchange controls is widely accepted by authorities on international law"); *Braka v. Multibanco Comermex, S.A.*, 589 F. Supp. 802, 804 n.1 (S.D.N.Y. 1984) ("Mexican government's actions giving rise to

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[12] Comment b to that Section specifies that:

> [A] requirement that foreign funds held within the territory of the state be surrendered against payment in local currency at the official rate of exchange is not wrongful under international law, even though the local currency is less valuable on the free market than the foreign funds surrendered.

See also id., Illustration 2. The general provisions of Restatement §188, cited by petitioners, clearly have no application given the specific provisions of §198. Restatement (Second) of Foreign Relations, Chapter 4, Introductory Note.

this action were regulatory in nature and not in violation of international law").[13]

Finally, not only are the regulations at issue here perfectly consistent with general principles of international law, but those same regulations have been found to be perfectly consistent with Mexico's obligation's under the Articles of Agreement of the International Monetary Fund, the multilateral treaty that governs the actions that foreign states are permitted to take in respect of the control of their monetary resources. This has been affirmed by the Director of the Legal Department of the International Monetary Fund.[14] In a letter which was filed in this case, he concluded that

> provisions of Mexico's Currency Regulations (enacted in August and continuing in effect today) which require payment of deposits in Mexican banks to be made in Mexican pesos regardless of the currency in which the deposits are denominated . . . do not violate and are not inconsistent with the Articles of Agreement of the International Monetary Fund.

Callejo v. Bancomer, S.A., 764 F.2d 1101, 1119 (5th Cir. 1985) (reproducing letter).

Petitioners' suggestion that these established principles of international law have been swept aside by 22 U.S.C. §2370(e) is unavailing. In the first place, a reference to the compensation

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[13] Those cases are consistent with prior decisions involving other countries. *See, e.g., French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 64, 295 N.Y.S.2d 433, 450, 242 N.E.2d 704, 715-16 (1968) ("the present refusal of the Cuban government to surrender American dollars in order to protect its dollar reserves, though harsh in its effect, would also seem to be within the limits of international legality").

[14] Petitioners incorrectly state that the Legal Director's letter referred only to the August 12, 1982 regulations and not to subsequent versions of those regulations. The letter was dated May 3, 1983 and refers to "Mexico's Currency Regulations (enacted in August and continuing in effect today)". *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1119-20 (5th Cir. 1985) (accepting conclusions of IMF letter).

provisions of that section is not relevant to respondents' main point that international law does not consider the enactment of nondiscriminatory exchange control regulations to violate international law, irrespective of the type of "compensation" involved. Moreover, the principal subsection cited by petitioners, 22 U.S.C. §2370(e)(1), deals only with the President's right to suspend assistance to nations which have seized ownership or control of property, and has nothing to do with the Act of State Doctrine. By contrast, 22 U.S.C. §2370(e)(2) does detail instances in which the Act of State Doctrine is not available, but does not prescribe the standards of compensation that the court must apply in resolving the international law issue. *See* Restatement (Revised) of Foreign Relations §470, Comments c and d (Tent. Draft No.6, April 12, 1985) ("the one court that has passed on the point has suggested that U.S. courts may be free to make their own interpretations of the applicable international law standard"); Restatement (Second) of Foreign Relations §185, Reporters' Note 1 (1965) ("If the statute does constitute such a definition [of international law standards], it would apparently not have been binding"); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 887-88 (2d Cir. 1981) ("the standard of compensation with respect to Chase's expropriation claims is to apply principles of international, not merely local, law").

C. *Petitioners Improperly Seek American Judicial Intervention In Areas In Which Foreign Sovereign Prerogatives Are Well Established*

The regulations issued by Mexico represent a recognized exercise of fundamental economic powers of sovereign nations:

> This is not an era . . . in which there is anything novel or internationally reprehensible about even the most stringent regulation of national currencies and the flow of foreign exchange. Such practices have been followed, as the exigencies of international economics have required — and despite resulting losses to individuals — by capitalist countries and communist

> countries alike, by the United States and its allies as well as by those with whom our country has had profound differences. They are practices which are not even of recent origin but which have been recognized as a normal measure of government for hundreds of years, if not, indeed, as long as currency has been used as the medium of international exchange.

French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 63, 295 N.Y.S.2d 433, 449, 242 N.E.2d 704, 715 (1968). As the Ninth Circuit recognized, petitioners, far from asking the court to enforce clear principles of international law, are demanding domestic judicial intervention in areas in which sovereign prerogatives are well established:

> Even if there had been a taking of [respondents'] property, we would be reluctant to adopt the effective result of their position here: a judicially established guarantee of the full repayment of investments abroad in certificates of deposit notwithstanding the actions of foreign governments attempting to control their own economies. The courts of this country should not operate as an international deposit insurance company, hauling foreign sovereigns before us whenever disgruntled investors so desire.

Petitioners' Appendix at 42-43.

CONCLUSION

For all of the reasons set forth above, the Petition for a writ of certiorari should be denied in its entirety.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON,
GEORGE M. DAVIES, et al.,
Petitioners,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C.,
and BANCO NACIONAL DE MEXICO, S.A.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents' repeated assertions that the decision below is "consistent with" or "identical to" those reached by the Fifth (Callejo v. Bancomer, S.A., 764 F.2d 1101 (1985)) and Sixth Circuits (Riedel v. Bancam, S.A., 792 F.2d 587 (1986)), and that those decisions therefore constitute an "unanimous, consistent body of circuit decisions" on the securities question are disingenuous. In fact, the Fifth Circuit in passing (footnote 33) simply accepted the Ninth Circuit's earlier ruling on the question (Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (1984); cert.den. 469 U.S. 1108) without an iota of independent analysis; and the Sixth Circuit never even reached the question because Riedel never raised it. Moreover, in Meason v. Bank of Miami, 652 F.2d 542 (1981); cert.den., 455 U.S. 939, the Fifth Circuit held that whether or not a foreign certificate of deposit was a

security depended upon its investment character. And in SEC v. First American Bank & Trust Co., 481 F.2d 673 (1973), the Eighth Circuit held that uninsured domestic "certificates of investment and passbook savings accounts" sold through the facilities of interstate commerce "are securities" for purposes of the Securities Act of 1933. Thus the decision below hardly represents the kind of "settled law" respondents would have this Court believe; it is entirely dependent upon an erroneous reading and application of Marine Bank v. Weaver, 455 U.S. 551 (1982)(see district court opinion in Wolf, supra, 549 F.Supp. 841 at 845, per Schwarzer, J., "Weaver ... does not compel the conclusion that Mexican banking laws obviate the application of the securities acts in this case."); but unless it is reviewed, it will surely become the law of the land.

In this age of world economic chaos, when the insolvency even of nations is not unheard of, it is both reasonable and desirable to regulate the marketing here of the deposit instruments of foreign banks. And it is entirely inconsistent with Weaver to exempt such instruments from the registration and disclosure requirements of the federal securities laws when those instruments are unregulated by any other federal laws.

Respondents' bland dismissal of the International Banking Act of 1978, 12 U.S.C. §§ 3102 et seq., as having "absolutely no application to the facts of this case" intentionally ignores those specific findings of the Congress that passed this legislation:

> ... [T]he need for both Federal monetary policy controls and for a Federal presence in the regulation and supervision of their [foreign banks] activities in the United States ...

S.R. 95-1073; reprinted in 1978 U.S. Code Cong. & Adm. News, 1422. Despite the court

of appeals' finding below that

> ... the banks solicited, marketed, and generally encouraged U.S. investors to deposit monies in their banks ... [and] engaged in a regular course of commercial conduct in the United states ...

Pet.App. pp. 13, 15, its holding that such activities are beyond domestic regulation violates the spirit of that Act and the letter of the Securities Act of 1933.

The decision below that the dollar depositors' rights in property were [protected by, but] not taken in violation of international law notwithstanding the failure to pay full compensation, is a decision of first impression, and presents a question of utmost importance. In none of the other so-called similar cases, Braka v. Bancomer, S.A., 762 F.2d 222 (CA2 1985); Callejo v. Bancomer, S.A., 764 F.2d 1101 (CA5 1985), were the claims brought or considered under the "taking" exception to sovereign immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(3), nor

was the explicit mandate of the second Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. §2370(e)(2), that the act of state defense shall not be applied in cases presenting such claims even addressed. In DeSanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (1985)(unmentioned by respondents), the Fifth Circuit did actually recognize but then sidestepped the question by holding that because the plaintiff there was a national of Nicaragua -- the taking state, she was not entitled to the protections of international law.

> Thus, even if Banco Central's actions might have violated international law had they been taken with respect to an alien's property, the fact that they were taken with respect to the intangible property rights of a Nicaraguan national means that they were outside the ambit of international law.

It seems clear the Fifth Circuit, despite its holding in Callejo, supra, would have little difficulty finding that a taking in violation of international law occurred

on the facts at bar.

Respondents' essential reliance upon sub dicta in a 4 to 3 state court opinion that has since been rejected by its own majority is chutzpatic but hardly persuasive on the question of whether the admitted failure to pay fair value for the confiscated dollar deposits was a violation of international law. Both J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 333 N.E.2d 168 (Ct.App.N.Y. 1975); cert.den., 96 S.Ct. 126; and Perez v. Chase Manhattan Bank, S.A., 463 N.E.2d 5 (Ct.App.N.Y. 1984), reached decisions contrary to that same court's earlier opinion in French v. Banco Nacional de Cuba, 242 N.E.2d 704 (Ct.App.N.Y. 1968), upon which respondents and the court of appeals rely. Even respondents' own expert, Dr. F.A. Mann said about French,

> It is to be hoped that in England the result would have been different.

Mann, The Legal Aspect of Money, 4th Ed. 418.

It is a part of the record below that the Banco de Mexico was given absolute discretion to set (or alter) the rates of exchange at which foreign currency obligations might be discharged. It set highly confiscatory rates that were absolutely unnecessary to the preservation of Mexico's foreign currency reserves, and unfair and offensive to the contractual and property rights of those U.S. citizens who had deposited their dollars in good faith and in the honest belief their rights to repayment in dollars would be honored. As Dr. Mann has written,

> It is fair and equitable treatment or, as it is sometimes put, good faith that every State is internationally required to display in its conduct towards aliens ... [W]hile normally the State is entitled at its discretion to regulate its monetary affairs, there comes a point when the exercise of such discretion so unreasonably or grossly offends against the alien's right to fair and equitable treatment ... that international law will intervene.

Mann, The Legal Aspect of Money 4th Ed., 476, 477. He concludes at page 530,

> These Agreements [protecting foreign investment] may lead to the acceptance of the broad principle of customary law and equity that a Government which has approved the importation of capital is bound to approve its re-exportation, that new capital invested in an economy with Government approval must be returned and profits arising from it must be remitted.

Application of this broad principle of customary law and equity is all the dollar depositors have ever asked.

All of the leading international authorities recognize that an agreement, valid and enforceable when made, cannot be rendered void by an intervening currency regulation; see, e.g., Mann, The Legal Aspect of Money 4th Ed., 376-378; 428-429; see also, Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F.Supp. 870 (S.D.N.Y. 1983). And, 2 Iran-U.S. Claims Tribunal Reports 340 (1983-I):

> Assuming that the License agreement between Kimberly and Novzohour did not comply with Iranian foreign exchange regulations in so far as it provided for payments in U.S. dollars, the Respondent has not proven that such a

> contractual provision was legally prohibited at the date when the contract was signed. Nor has it proven that the new foreign exchange regulations, when they were enacted, caused the contract to be null and void. Although Novzohour might have been prevented from transfering to Kimberly the payment of its debt in U.S. dollars, the existence and amount of the debt cannot seriously be disputed.

Just as the existence and the amount of the indebtedness of respondents to petitioners cannot seriously be disputed, any judgment in their favor would not even offend Mexico's exchange control regulations that do in fact permit the export of dollars. As a part of the record below, a Decree adopted December 10, 1982 provides,

> ... the Ministry of Finance shall proceed to repeal all provisions that have imposed restrictions on the export and import of foreign bank notes [bills] and bank notes of legal tender in the Mexican Republic to ensure the free international exchange of the aforementioned items.

Respondents finally rely upon Knox v. Lee, 12 Wall. 457-680 (1870) that held Congress had the constitutional power to make treasury

notes legal tender for the payment of debts. What respondents carefully omit to disclose is that Knox v. Lee also said Congress lacked the power to affect contracts to pay specific moneys -- as in the cases at bar, where the agreements specifically provide for the repayment of U.S. dollars upon maturity of the dollar-denominated deposit agreements. In describing the kind of contracts the Legal Tender Acts might validly affect, this Court said,

> We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.

20 S.Ct. at 311; 20 L.Ed. at 311.

And nowhere at all can any mention be found in respondents' brief of Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). If a foreign state's repudiation of a purely commercial obligation is neither an immune act of state nor subject to a claim of sovereign immunity, and is therefore

compensable, as this Court held in its plurality opinion in that case, then the repudiation here of the purely commercial obligations of the respondent banks to the dollar depositors must also be compensable.

For all of these as well as the reasons set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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NO. 86-1648

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON,
GEORGE M. DAVIES, et al.,
Petitioners,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C.,
and BANCO NACIONAL DE MEXICO, S.A.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

An intervening circumstance of substantial and controlling effect has just occurred and come to the attention of petitioners.

According to information from the General Counsel to the International Monetary Fund (letter reproduced in full following brief), the Supreme Court of Mexico in Case No. 676/84 just decided that the exchange control decree adopted by Mexico in September 1982 and pursuant to which the dollar-denominated deposits in the cases at bar were eliminated is invalid and unconstitutional as applied retroactively to foreign currency deposits made prior to its enactment. As respondents' brief at page 1 concedes, petitioners made "dollar-denominated deposits with the respondent banks in Mexico prior to August 12, 1982 ..." Those deposits at issue here are directly affected and preserved

by this brand new decision of the highest court in Mexico.

More specifically, that Court appears to have held the exchange control decree violated Mexico's constitutional prohibition on impairment of contracts (or retroactive legislation) and Article 267 of Mexico's General Law of Securities and Credit that has always required the repayment of foreign currency deposits in kind. That the dollar depositors here were entitled to prevail on the merits of their claims because their deposit agreements were breached and their deposits were taken pursuant to an illegal decree was presented to but ignored by the court of appeals below. Because jurisdiction was predicated upon both the "commercial activities" and the "taking" exceptions to sovereign immunity [there was also inherent diversity], and because the exchange control decree was the sole basis and defense for

respondents' breach of their commercial obligations and for their taking of the depositors' dollars, the invalidity of that decree eliminates the defense. At pages 20 and 21 of their reply brief to the court of appeals, petitioners explained,

> Article 267 of the General Law of Securities and Credit of Mexico [provides]: "The deposit of a given amount in national currency or in foreign moneys or currencies, transfers the property to the Depository [bank] and obliges the Depository [bank] to return the deposited sum in the same kind ..." [emphasis added]
>
> Article 267 is "still in effect", and Art. 3, ¶2 of the Transitory Articles of Mexican Law pertaining to Article 267 provides, "All other laws and regulations that are contrary to this law are hereby revoked." CR 36 #0174; CR 36 #0155; CR 33 #6978.
>
> Article 267 requires the repayment of dollars in kind ... [T]he operative regulations are plainly violative of Article 267.

Obviously, as the exchange control decree and regulations thereunder are invalid and unconstitutional as applied to foreign cur-

rency deposited in Mexico prior to September 1982, the dollar depositors in the cases at bar are entitled to repayment in kind of their dollar deposits (as they always were), and are entitled therefore to prevail on the merits of their claims (dollars are now freely exportable from Mexico, Petitioners' Reply Brief, page 9). This Court must, of course, apply the law "in effect at the time it renders its decision", United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801, Marshall, C.J.); Bradley v. School Board of City of Richmond, 416 U.S. 696, 711-714 (1974).

The undersigned has ordered a copy of the Mexican Supreme Court opinion in Case No. 676/84, and will attempt to expedite its translation into English for presentation to this Court; but as it is over 75 pages in length, that will take considerable time. It is likely respondents already have an

English translation available as it was respondent Bancomer which was a party to that case.

In any event, petitioners most strongly urge that a writ of certiorari must issue to review the judgment and opinion of the Ninth Circuit that is now in conflict with Mexico's highest court on the merits of the claims of the dollar depositors, who, together with all petitioners, will have no further recourse.

RESPECTFULLY SUBMITTED,

R. J. Wolf
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Counsel for Petitioners

(letter reproduced)

INTERNATIONAL MONETARY FUND

Washington, D.C. 20431

Cable Address
INTERFUND

May 6, 1987

Mr. Charles E. Brown
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Dear Mr. Brown:

I am extremely grateful to you for sending me copies of the material relating to Reidel v. Bancam. I shall read it with great interest. I am collecting material for a fourth volume on exchange control and other legal problems of interest to the IMF. I hope to begin work on it after I complete a present project on exchange rates in international law.

Two days ago I received a copy of the judgment of the Mexican Supreme Court in Case 676/84. It is now being translated.

It is lengthy, and the translation will undoubtedly take some time, but I will send you a copy as soon as it is available.

Meanwhile, you might like to know that my Mexican friend [the lawyer who prevailed] writes to me about the case as follows:

> Basically, the subject matter was a case in which a person who deposited foreign currency with Bancomer, started an "amparo" proceeding arguing that the application of the exchange control rulings of September, 1982 violates [the] Mexican Constitution, which prohibits retroactive effects.
>
> Pursuant to the criterium of the Judge, the bank must reimburse the amount in foreign currency as provided for in article 267 of the General Law of Negotiable Instruments and Credit Transactions, because the deposit of foreign currency was created before the enactment of the exchange control decree of September 20, 1982.
>
> Against the decision of the Judge, an appeal (revision) was submitted before the Supreme Court. The Supreme Court confirmed the resolution of the District Court, although it based itself on procedural items without analyzing the substance of the problem.
>
> The main argument here was, as I mentioned above, that it was considered that the application of the decree of exchange control enacted on September

1982 cannot be applied to transactions executed before said decree because such applicability would imply granting retroactive effect to the decree, which is prohibited by the Constitution.

With best wishes,

Yours sincerely,

Joseph Gold
Senior Consultant

Supreme Court, U.S.
FILED
MAY 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1648

IN THE

Supreme Court of the United States

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONDENTS' CONSOLIDATED SUPPLEMENTAL BRIEF

Preliminary Statement

This consolidated brief is filed in response to Petitioners' Supplemental Brief.

Argument

Petitioners allege that the Supreme Court of Mexico recently ruled in a case not involving petitioners that the Mexican exchange control decrees at issue in this case are invalid under Mexican law.

Even if petitioners' contention were true,[1] however, that would not furnish a reason for this Court to grant the Petition.

The Ninth Circuit's decision in this case was simple and straightforward: (i) that the certificates of deposit issued by the respondent banks are not securities, and (ii) that the Mexican decrees did not involve a taking in violation of international law. Those are the only issues raised in the Petition.[2] It is clear, however, that the Mexican court decision alleged by petitioners did not and could not decide the first issue in this case, *i.e.*, whether a "security" existed under United States federal securities law. As to the second issue raised in the Petition, even if the alleged Mexican decision held that the decrees are invalid under *Mexican law*, such a decision would not go to the question of whether the decrees violated *international law*, which is the basis of petitioners' claim.[3]

Not only is petitioners' reference to an alleged Mexican court decision irrelevant to the issues presented by the Petition, but peti-

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[1] Petitioners did not attach a copy of the alleged opinion to their Supplemental Brief and seek to rely only on an unofficial description of that decision.

[2] Petitioners' suggestion now that they have breach of contract claims is not an issue presented by the Petition. Furthermore, as respondents noted in the Consolidated Brief in Opposition to the Petition (at p. 16 n.10), any such claim would be defeated by the Act of State Doctrine, as all courts that have considered such claims have dismissed the actions based on that Doctrine. Moreover, it is established law that the Act of State Doctrine applies even if it is alleged that the sovereign act at issue violates the internal law of the foreign state. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964); *Pons v. Republic of Cuba*, 294 F.2d 925, 926 (2d Cir. 1961), *cert. denied*, 368 U.S. 960 (1962); Restatement (Second) of Foreign Relations §41, comment f and illustration 11 (1965); Restatement (Revised) of Foreign Relations §469, comment d (Tent. Draft No. 7 April 10, 1986) ("courts in the United States will not entertain challenges to the validity of a taking by a foreign state on the ground that it was contrary to the state's own constitution or laws, or that a law or decree had not been properly enacted").

[3] Petitioners asserted as a cause of action that the decrees violated international law in an attempt to fit within the jurisdictional provisions of 28 U.S.C. §1605(a)(3), which extends to claims of takings of property in violation of international law.

tioners have misled this Court in suggesting that the Mexican decision is a dramatic new development. Even according to the unofficial description relied upon by petitioners, Supplemental Brief at p. 7, the Mexican decision they refer to merely "confirmed the resolution" of the lower court on "procedural items" only. The existence of the Mexican court decision has thus been public knowledge for quite some time.[4] Moreover, at the very beginning of this case petitioners themselves were aware that one Mexican court had ruled the decrees invalid under Mexican law on October 20, 1982. *See* Opposition to Motion to Dismiss, filed April 1985 in all three cases brought against the respondent banks, at p. 15. The existence of these Mexican cases, however, is not relevant to the issue presented by the Petition, nor is it relevant to the decision below, which rested instead on distinct and independent grounds under United States federal securities law and international law.[5]

In sum, the unofficial description of the decision of the Mexican court upon which petitioners seek to rely is irrelevant to the issues raised by the Petition herein and, according to the very material cited by petitioners, is not a new development but merely the confirmation

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[4] Indeed, the respondent banks have suggested that petitioners seek redress in Mexican courts. The availability of redress, which is indicated by the decision raised by petitioners, further demonstrates that the Ninth Circuit was correct in holding that the Mexican legal system affords protections to depositors substantially similar to that afforded to depositors in the United States.

[5] It should also be noted that the Mexican Supreme Court decision referred to by petitioners is not binding in similar cases in Mexican courts, since under Mexican law there must be five consecutive and consistent Supreme Court decisions ruling on a issue before binding precedent is established. *Ley de Amparo* §192.

on "procedural items" of preexisting decisions of other Mexican courts. Petitioners' Supplemental Brief thus fails to present a ground for this Court to grant the Petition.

Respectfully submitted,

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